Supreme Court, U.S.
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No. _____ OFFICE OF THE CLERK

In the
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

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William Sumner Scott,

Petitioner

v.

Prudential Securities, Inc.,

Respondent

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

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# PETITION FOR A WRIT OF CERTIORARI

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102 pp

## QUESTIONS PRESENTED

Must a court review questions of law, *de novo,* presented by a Petition to Vacate an arbitration award pursuant to the Federal Arbitration Act, 9 U. S. C. §1, et seq.

When a court is obligated to review questions of law, *de novo,* must the court consider all relevant facts, including the relationship of the parties and their contractual commitments, to complete that review.

Will the Federal courts intercede to review and, if appropriate, modify Federally sponsored arbitration procedures and the form of arbitration awards to guarantee due process pursuant to the Fifth Amendment to the United States Constitution and the Federal Arbitration Act, 9 U. S. C. § 1, et seq., particularly, § 10 (a), to ensure that arbitration hearings are fair and that complete court review is possible.

Will due process in the form of a trial by jury guaranteed by both the Fifth Amendment to the United States Constitution and Article I, Sections 2, 9 and 21 of the Florida Constitution prevent forced arbitration when an arbitration clause is incorporated by reference in a registration form to the rules of the National Futures Association, (the "NFA"), an agency of the Federal government, without specific mention in the form of the existence of the arbitration clause.

Must the arbitration clause be in effect when the contract between the parties is made, or may it be incorporated by reference in rules which were revised to include the clause after the dispute arose and after the relationship between the parties was terminated.

Does the sole stockholder, director and officer of a corporate general partner of a limited partnership have sufficient nexus with the business of the partnership to be forced to arbitrate a dispute, individually, with a third party that did business only with the limited partnership.

Must a limited partnership be a member of the self regulatory organization as a condition precedent to the forced application of that organization's arbitration rules upon the registered principal of the corporate general partner.

When does the fact that arbitrators are engaged in the same business as a party to an arbitration constitute evident partiality sufficient to disqualify one or more of such arbitrators upon review *de novo* by the Federal courts pursuant to Section 10 (a)(2) of the Federal Arbitration Act. 9 U. S. C. § 10 (a)(2).

Is evident partiality of one or more arbitrators, which unfairly affects an arbitration award conducted by an agency of the Federal government, a violation of due process rights guaranteed by the Fifth Amendment to the Constitution of the United States.

Was an arbitration panel guilty of misconduct pursuant to the Federal Arbitration Act, 9 U.S. C. § 10 (a)(3) when it refused to postpone a hearing or, in the alternative, permit a party to participate by telephone.

Will the Supreme Court of the United States provide legal interpretation to resolve the conflict among the circuits in the application of: (i) the "arbitrators exceeded their powers" provision of the Federal Arbitration Act ("FAA"), 9 U.S.C. §10 (a)(4), and (ii) the "manifest disregard for the law" test developed by the circuits following *Wilko v Swan,* 346 U.S. 427, 436-437, 74 S.Ct. 182, 187-188, 98 L.Ed. 168 (1963).

Will the Supreme Court of the United States provide legal interpretation to provide consistent application among the circuits of the non-statutory "completely irrational" or "arbitrary and capricious" test used to justify vacatur of an arbitration award.

Will a broker be estopped to deny that the intended purpose of the limited partnership with a corporate general partner was to insulate the principal of the general partner from personal liability

for trades placed directly to the broker by an independent trading advisor, when all of the facts were disclosed and the broker accepted the corporate structure as a business risk at the time the contracts, including the power of attorney, were accepted by the broker.

Will due process guaranteed by the Fifth Amendment of the United States Constitution be satisfied when an arbitration panel assembled by an agency of the Federal government pierces the corporate veil to hold a shareholder/manager personally liable for the ordinary debts of a corporation without specific findings of fraud and control in the award.

Must the sole shareholder, director and officer of the corporate general partner of a limited partnership have control over the creation of a loss and commit fraud or other intentional wrongful conduct to be held personally liable for the ordinary debts of the partnership.

Does due process provided in the Fifth Amendment of the United States Constitution obligate the District Court to permit a party to file a Response to a Motion to Confirm an Arbitration Award pursuant to Federal Rule of Civil Procedure 7(a).

May the *Constitutional* right to equal protection under the law be preserved by a general reference to a violation of those rights, or must the claim be specific, to prevent a waiver of that claim.

## PARTIES TO THE PROCEEDINGS

The parties in interest are listed in the caption. Prudential Securities, Inc. is a subsidiary of the Prudential Life Insurance Company.

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William Sumner Scott ("Scott") hereby Petitions for a Writ of Certiorari be issued to review a judgment of the United States Court of Appeals for the Eleventh Circuit.

## OPINIONS BELOW

The Court of Appeals decision dated May 18, 1998, (App., *infra*, A), is reported at 141 F.3d 1007 (11th Cir. 1998)(table). The Court of Appeals denial of the Petition for Rehearing, (App., *infra*, B) is unreported. The denial of the Petition for Reconsideration by the District Court, (App., *infra*, C) is unreported. The District Court Order and Opinion (App., *infra*, D) entered on July 18, 1996, at case number 1:95-CV-3284 -JEC is unreported. The April 8, 1996, Order of the District Court to extend the time to admit the arbitration transcript (App., *infra* E) is unreported. The April 12, 1996, Order to deny the admission of the transcript (App., *infra* F) is unreported. The arbitration award entered by a panel of arbitrators selected by the National Futures Association dated November 25, 1995, (App., infra, G) is unreported.

## JURISDICTION

The final order of the Court of Appeals was the denial of Scott's Petition for Rehearing and Suggestion for En Banc Consideration on July 30, 1998, (App., *infra*, B). This Petition is filed, and the three hundred dollar ($300) fee paid, pursuant to 28 U.S.C. Section 1254 (1) and Supreme Court Rule 13.3, within ninety (90) days of the entry of the final order.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part: "no person shall . . .be deprived of life, liberty, or property, without due process of law ..."

Florida Constitution (1968), Article I, Section 2, Basic Rights, provides:

"All natural persons are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess and protect property; except that the ownership, inheritance, disposition and possession of real property by aliens ineligible for citizenship may be regulated or prohibited by law. No person shall be deprived of any right because of race, religion or physical handicap.

Amended, general election, Nov. 5, 1974"

Florida Constitution (1968), Article I, Section 9, Due Process, provides:

"No person shall be deprived or life, liberty or property without due process of law, or be twice put in jeopardy for the same offense, or be compelled in any criminal matter to be a witness against himself."

Florida Constitution (1968) Article I, Section 21, Access to Courts, provides:

"The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay."

Commodity Exchange Act, 7 U.S.C. § 1, et seq., provides:

7 U.S.C. § 6 k(l). It shall be unlawful for any person to be associated with a commodity pool operator . . . unless such person is registered with the Commission (sic Commodity Futures Trading Commission, the "CFTC") . . . are obligated to register.

7 U.S.C. §7 21(a) and (o). The CFTC delegated the registration function to the National Futures Association, a private corporation, registered as a futures association under the CEAct.

Federal Arbitration Act, 9 U.S.C. §§ 1, et seq., at §10, provides:

"(a) In any of the following cases the United States court ... may make an order vacating the award ...

(1) Where the award was procured by corruption, fraud, or undue means.

(2) Where there was evident partiality or corruption in the arbitrators or either of them.

(3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made."

Florida Statute of Frauds, Title 41 section 725.01 provides:

"No action shall be brought whereby to charge . . . the defendant upon any special promise to answer for the debt, default or miscarriage of another person . . . unless the agreement or promise upon which such action shall be brought, or some note or memorandum thereof shall be in writing and signed by the party to be charged therewith or by some other person by him thereunto lawfully authorized."

NFA, Member Arbitration Rules, adopted May 1, 1992, provide:

**"Section 1. Definitions. As used in these Rules-**

(a) "Associate"-means a person who is registered with NFA as an Associate or was so registered when the acts or transactions that are the subject of the dispute occurred. (Under NFA

Bylaws every person who is associated with a member within the meaning of the term "associated person" as used in Section 4k of the Commodity Exchange Act, and who is required to be registered as such with the Commission, must register with the NFA as an Associate.)."

**"Section 2. Arbitrable Disputes.**

(a) Claims. . . .disputes between and among Members and Associates shall be arbitrated under these Rules upon the filing of a Demand by a Member or Associate . . .".

**"Section 3. Arbitration Panel.**

**(c) Appointment of Panel, Disclosure and Challenge.**

The President shall thereupon appoint, . . ., an arbitration Panel to resolve the dispute. . . .The Secretary shall promptly notify the parties of each arbitrator's name, business affiliations, and other relevant information. Any objection of a party to such appointment shall be specific and for cause and submitted to the President in written form. Each appointed arbitrator shall disclose to the President any circumstances likely to affect impartiality, including any bias or any financial interest in the result of the arbitration or any past or present relationship with the parties or their representatives. Upon receipt of such information from such arbitrator or other source, the President shall communicate such information to the parties, and if the President deems it appropriate to do so, to the arbitrator and others. Thereafter, the President shall determine whether the arbitrator should be disqualified and shall inform the parties of the decision, which shall be conclusive."

**"Section 7. Pre-Hearing**

(b)(1) At least 15 days prior to the date assigned for an oral hearing, each party shall serve on every other party all

documents in such party's possession which the party intends to introduce into evidence at the hearing . . .".

**"Section 9. Hearing.**

**(d)** (10) . . .The Panel shall afford the parties every reasonable opportunity to present their case completely.

**(e) Extensions and Postponements.**

Extensions of time or postponements of the hearing may be granted by the Panel when the interests of justice so require, but a hearing in progress shall not be adjourned or interrupted except in compelling circumstances."

**"Section 11. Arbitration Fees.**

**(a) Filing and Hearing Fees.**

Each Member or Associate claiming or counterclaiming under these Rules shall pay a filing and hearing fee based on the amount claimed or counterclaimed, including punitive and treble damages, but exclusive of interest and costs, as follows:

| Amount of Claim or Counterclaim | Filing Fee | Hearing Fee |
|---|---|---|
| $ 0.00 - $10,000 | $ 750.00 | $ 50.00 |
| $10,000.01-20,000 | $1,900.00 | $ 150.00 |
| $20,000.01-150,000 | $4,400.00 | $ 675.00 |
| More than $150,000 | $4,400.00 | $ 1,350.00" |

## STATEMENT OF THE CASE

Professional managers who are paid a percentage of the profits they produce in a customer's trading account will not accept the delays and judgment interference attendant to customer approval. To induce professional managers to accept trading

responsibility in return for incentive fees (*i.e.* only from profits produced), the securities industry has developed the use of a power of attorney, which allows the manager to buy and sell securities directly with the broker, without customer involvement.

In response to the demand that trades be made without their involvement, mutual fund managers and commodity pool operators have instituted the use of a limited partnership with a corporate general partner to insulate them from personal liability for losses which may be created by the independent trader. The brokers have accepted the responsibility to prevent overdrafts in these accounts.

On November 17, 1983, to insulate him from personal liability and to establish an audited performance record to justify the raise of money from other investors, Scott formed a limited partnership pursuant to the Pennsylvania Uniform Limited Partnership Act named Creative Strategy Fund I ("CSF", "Fund", or "Partnership"). The Partnership was continuously managed by a corporate general partner. The corporate general partner during the time the accounts were open at Prudential Securities, Inc. ("Prudential"), was Creative Strategies, Incorporated, a Delaware corporation, ("CSI" or the "General Partner"). Scott was the sole shareholder, director, and officer of the General Partner. The General Partner and Scott, as the limited partner, were the only partners of the Partnership.

The National Futures Association, (the "NFA") is authorized under the CEAct to serve as a self regulatory organization to register futures commission merchants ("FCM"), commodity pool operators ("CPO") and commodity trading advisors ("CTA") as those terms are defined in the Commodity Exchange Act, 7. U.S.C. § 1, et seq. ("CEAct"),) § 1a(4), (5), and (12). The General Partner, as required by the CEAct, was registered as a commodity pool operator. Scott signed a NFA Form 8-R to become the registered principal of the General Partner which obligated him to comply with NFA rules which may then or, thereafter, be adopted. Prudential was a registered FCM (*sic* broker) and Robert Rowland ("Rowland") was registered as a CTA.

In November, 1991, the Partnership opened a $15,000 account at Prudential. Rowland was granted exclusive authority to trade the account by use of the Prudential standard form power of attorney. The General Partner did not retain any right to direct, nor did it place, any trades in the account. It was, therefore, impossible for Scott to have committed any fraud or to have had control over any loss created in the account. The entire loss at issue in this case was the result of trades placed by Rowland directly with Prudential pursuant to the Prudential standard form power of attorney. Prudential accepted total responsibility to manage the money on deposit. As the Circuit Court found from its review of the record, Scott specifically refused Prudential's request that he execute a personal guarantee of any Partnership account. App A, page A-2, *Scott v Prudential*, 141 F.3d 1007, 1010, (11th Cir 1998).

Without the participation or knowledge of any management representative of the Partnership, Prudential allowed Rowland to place more positions in the account than the $15,000 would allow. From March 27 through April 2, 1992, the positions placed by Rowland directly to Prudential, without Scott's involvement, caused a loss of $166,820.27 in the Partnership's $15,000 account.

Rather than admit it breached its obligation to properly margin the account, Prudential elected to use a forged transfer agreement to steal $50,733.34 from a segregated partnership account over which no power of attorney had been granted and to bring an arbitration before the NFA against the Partnership, the General Partner, and Scott, personally, to collect $101,087.53 (the difference between $166,820.27 and all the money the partnership had on deposit at Prudential at the time of the loss, $65,733.34).

## THE PROCEEDINGS BELOW

In May, 1992, Prudential brought an arbitration claim before the National Futures Association (the "NFA") against CSF, its corporate General Partner, and Scott for $101,087.53. Within 30 days thereafter, Scott filed objections to the scheduling of any hearing against him.

Because the NFA required a filing fee of $5,075 for a cross claim against Prudential and Rowland, CSF, its corporate General Partner, and Scott petitioned to remove the case from the NFA to the Commodity Futures Trading Commission (the "CFTC"). The removal was successful as to CSF and the corporate General Partner, but the CFTC refused to take jurisdiction of the Prudential claim against Scott because he was not a Prudential customer. The CFTC Administrative Law Judge ("ALJ") Initial Decision and the subsequent appeal to the CFTC held that the partnership and its general partner were liable to Prudential. *Creative Strategy Fund I v. Prudential Securities, Inc., Robert Rowland and The Rowland Brothers Co., Inc.* [1995 CFTC Decisions] Comm. Fut. L. Rep. (CCH) at paragraph 26,304, at page 42,498 (CFTC Feb. 8, 1995) and *Creative Strategy Fund I v Prudential Securities, Inc., Robert Rowland and the Rowland Brothers, Inc.* [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) at paragraph 26,010 (Initial Decision Feb. 23, 1994). Scott was not a party to the CFTC proceeding. In July, 1995, the NFA removed the stay of the arbitration filed by Prudential against Scott.

On August 7, 1995, the NFA circulated available dates for an October, 1995 hearing.

On September 2, 1995, Scott filed his claim that the arbitrators, individually and collectively, were evidently partial to the Prudential claim.

On September 26, 1995, the NFA notified the parties that the arbitrators originally selected would hear the Prudential case against Scott on October 31, 1995, in Atlanta, GA.

On October 5, 1995, Scott filed his renewed motion to dismiss the arbitration against him.

On October 18, 1995, the Partnership, on behalf of Scott, petitioned the United States District Court for the Southern District of Florida at case number 95-8423 for a temporary restraining order ("TRO") to enjoin the NFA arbitration from going forward.

On October 18, 1995, Scott filed a Petition with the NFA to postpone the arbitration hearing scheduled for October 31, 1995, or, in the alternative, requested to participate by telephone. On October 27, 1995, Prudential's Motion to Compel Production of Documents was granted and Scott's request to participate in the arbitration hearing by telephone was denied.

On October 30, 1995, at 5:10 p.m., the USDC for the Southern District of Florida, Miami, FL provided verbal notice that the Petition for TRO to stay the arbitration proceeding was denied. On October 31, 1995, at 9 a.m. the arbitration hearing commenced in Atlanta, GA.

On November 20, 1995, without explanation or justification for their findings, the NFA arbitration panel found Scott personally liable to Prudential for $101,087.54, plus interest, and the $5,075 NFA filing fee paid by Prudential to commence the arbitration.

Federal jurisdiction in the court of the first instance was obtained pursuant to the Federal Arbitration Act, 9 U. S. C. § 1, et seq., (the "FAA"), § 10, upon Scott's filing a Petition to Vacate in the District Court for the N. D. of Georgia, at Atlanta, the site where the NFA hearing was held. Prudential filed an Omnibus pleading to the Petition to Vacate which included a Response to the Petition to Vacate and a Motion to Confirm the Arbitration Award.

On April 8, 1996, the District Court entered an Order by consent of the parties which preserved Scott's right to file a responsive pleading to the Prudential pleading within ten days after the ruling by the District Court on Scott's motion to admit the transcript of the NFA proceeding to the record of the case. On April 12, 1996, the Court denied Scott's Motion to admit the written transcript of the proceedings. On April 22,1996, Scott caused the NFA to file the audio tape of the arbitration hearing, properly authenticated.

On July 18, 1996, the District Court admitted the Cassette to the record, but in the same Order, also denied the Petition to

Vacate without affording Scott the opportunity to respond to the Prudential Motion to Confirm the Award. (App D, page 39.)

## REASONS FOR GRANT OF THE WRIT

### I.

### THE PETITION SHOULD BE GRANTED BECAUSE THE LOWER COURTS REVIEWED SCOTT'S RELATIONSHIP WITH THE NFA, RATHER THAN THE RELATIONSHIP OF THE PARTIES, WHICH RESULTED IN THE WRONGFUL DENIAL OF SCOTT'S CONSTITUTIONAL RIGHT TO A JURY TRIAL.

Resolving the question of arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate. *First Options of Chicago, Inc. v Kaplan*, 115 S. Ct. 1920, 1923 n 1,2, 131 L.Ed. 2d 985, (1995). Courts should not assume that the parties agreed to arbitrate arbitrability unless there is "clear and unmistakable" evidence that they did so. *Id.* n 5 at 1924.

In this case, the intent of the of the parties is properly determined by an examination of the agreements between Prudential and the Partnership. That examination discloses that the parties, including Prudential, intended the Limited Partnership with a corporate general partner to insulate Scott from all liability for the Partnership's debts, especially any debts created by trades entered by trading advisors directly to Prudential pursuant to Prudential's standard form power of attorney. (App G, Defenses of Scott). However, the lower courts determined that the relationships of the parties and their contractual commitments were deemed not necessary to understand the issues on appeal. App. A, footnote 2, page D-15. *Scott v Prudential Securities, Inc.* 141 F.3d 1007, 1010, footnote 2.

The District Court held that because Federal Statute obligates all members and associates of the stocks and commodities industries to register using National Association of Securities

Dealers, Inc. or NFA forms, all such registrants are subject to the same binding arbitration. To become a registered principal of the General Partner of the commodity pool, Scott was required to sign NFA Form 8-R, which incorporated the NFA rules by reference. The Court held that the incorporation by reference (i) obligated him to comply with all NFA rules, including the rule to arbitrate which was added after the liquidation of the account; and, (ii) provided sufficient nexus between Prudential and Scott to obligate Scott to arbitrate the Prudential claim. App D, page 8. The Circuit Court upheld this finding. App A, page 7, *Scott* at 1013, n, 8 citing *U. S. Fidelity & Guar. Co. v West Point Constr. Co.*, 597 F.2d 1507, 1508 (11th Cir. 1988) (per curiam). The lower court decisions in this case violate this court's directive that the agreements between the parties be examined to determine arbitrability. *Kaplan*, 115 S.Ct. at 1924, n 5. The lower court rulings also violate other rules of law.

The document to be incorporated by reference must be in existence at the time the contract is made. cf. *Black's Law Dictionary*, 766, (rev. 6th ed. 1990), *Association Concerned About Tomorrow, Inc. v. Dole*, 610 F. Supp. 1101, 1109 n 10, (D.C. Tex 1985). The Partnership account was opened at Prudential in November, 1991 and liquidated on April 2, 1992. (App D, page 2). The Form 8-R the lower courts relied upon was signed by Scott on April 12, 1992 and the NFA Member arbitration rules were adopted on May 1, 1992. (App A, page 7), *Scott v Prudential Securities, Inc.*, 141 F.3d 1007, 1013, n 9. Accordingly, even if the lower courts were correct in their determination that the nexus between Scott and the NFA forced the arbitration, the arbitration obligation was not in existence at the time Scott signed the Form 8-R and the account at issue was closed before the NFA arbitration clause was adopted. The arbitration clause in the *USF&G* case was in existence at the time the parties entered into their agreements and was specifically identified in the incorporation by reference. *U. S. Fidelity & Guar. Co.*, 597 F.2d at 1508.

And, the lower courts disregarded the proper application of the law of New York provided in the choice of law clause of the

Prudential new account forms and, the "points of contact" test, which also selects New York, because the trades, deposits, and account management were accomplished by Prudential from New York City. Under New York law, there can be incorporation by reference of an arbitration clause only by specific mention of the existence of the clause in the agreement between the parties. *S. Leo Harmonay, Inc. v. Binks Mfg. Co.,* 597 F. Supp. 1014, 1025, n 10; *Markewich v Adikes,* 422 F. Supp. 1144, 1147, n 3 (1976).

The National Futures Association ("NFA") is a government body. *Scott v Prudential,* District Court Order of July 18, 1996, *Scott v Prudential*, n. 24, page 38, (App D, page 38); *R. J. O'Brien & Assoc. v Pipkin*, 64 F.3d at 262. A government body cannot deny the right to procedural due process and free access to the courts prior to the taking of property in violation of the Fifth Amendment of the United States Constitution and Article I, Sections 2, 9, and 21, of the Florida Constitution (1968). *Carter v. Sparkman*, 335 So.2d 802, 805 (Fla 1976), *G.B.B. Investments, Inc. v. Hinterkopf* 343 So.2d 899 (3rd DCA 1977). The compelled arbitration before the NFA wrongfully denied Scott a trial by jury in violation of the due process guaranteed to him by the Fifth Amendment of the United States Constitution and, because Scott was a resident of Florida at the time of the dispute, also violated Article I, Sections 2, 9, and 21 of the Florida Constitution.

The CEAct provides that the commodity pool operator (*sic* the General Partner) will be registered, but the commodity pool (*sic* the Partnership), will not be registered. CEAct, 7 U.S.C. §§ 6f(a) and 6k(l). Accordingly, the CEAct contemplates there will be no nexus between Scott's status as a registered person of the General Partner and the claims by Prudential for payment of a debit balance against the Partnership.

No private right of action extends to any member of the NFA, including Prudential, to force Scott, individually, to comply with the Rules of the NFA. Only those charged with the responsibility to enforce the CEAct may bring that action. *In Re Soybean Futures Litigation*, 892 F. Supp. 1025, 1042, n10, (ND Ill

1995), *Abrams & Wofsy v Renaissance Investment Corp.*, 820 F. Supp. 1519, 1528 n8, (N. D. Ga. 1993). This action was commenced as a private claim by Prudential against Scott.

The lower courts further justified their decisions by the ruling in *R.. J. O'Brien & Assoc. v Pipkin*, 64 F.3d 257, (7th Cir. 1995). The facts in *Pipkin* are distinguishable. As stated above, the structure of the limited partnership with a corporate general partner was intended by all parties, including Prudential, to insulate the principal of the general partner, Scott, from personal liability. The purpose of using Pipkin's introducing broker was to transfer the customer credit risk from O'Brien, the FCM, to Pipkin's introducing broker. In addition, the introducing broker retained control over the trades and the creation of the loss. *Pipkin, Id.*

In this case, the general partner delegated control over the trades to Prudential and to the trading advisor. Scott urges this Court to (i) overrule *Pipkin* because the relationship that governs is the one between the parties, not the relationship created by the registration form or, in the alternative, (ii) distinguish Pipkin, because in that case the parties intended the introducing broker to have control over the trades, while in this case, Prudential and Rowland accepted total responsibility for the trades rather than the Partnership, the General Partner or Scott.

## II.

## THE PETITION SHOULD BE GRANTED TO ESTABLISH THE PROPER STANDARDS FOR THE LOWER COURTS TO REVIEW ARBITRATION AWARDS AS TO QUESTIONS OF LAW *DE NOVO* TO DETERMINE IF THE GROUNDS FOR VACATUR SPECIFICALLY PROVIDED IN THE FEDERAL ARBITRATION ACT (THE "FAA"), 9 U.S.C. § 10, WERE PRESENT IN THE RECORD.

### A. The Petition Should Be Granted Because The Courts Have Placed Conditions Upon The Vacatur Of Arbitration Awards For Fraud in Contravention of the

**FAA Which Provides The Award Will Be Vacated Where The Award Was Procured By Corruption, Fraud, Or Undue Means. 9 U.S.C. § 10 (A)(1).**

The CFTC deleted the account documents dated April, 1996 from the record; *i.e.* the first nine pages of the account documents attached to the Statement of Claim filed as Exhibit C to the Motion of Prudential to Confirm the Award. *Creative Strategy Fund I v. Prudential Securities, Inc., Robert Rowland and The Rowland Brothers Co., Inc.* [1995 CFTC Decisions] Comm. Fut. L. Rep. (CCH) at paragraph 26,304, at page 42,498 (CFTC Feb. 8, 1995).

Although Scott plead that the documents submitted to the arbitration panel by Prudential were fraudulent and that the CFTC had deleted them from its record, the NFA arbitrators refused to delete those documents from the arbitration record, including the transfer agreement Prudential forged to justify its claims.

Arbitrators are permitted to enter awards which contain only the amount of the award, without justification. *United Steelworkers of America v Enterprise Wheel & Car Corp.*, 363 U.S. 593, 598.

The courts have established conditions to be met before an arbitration award, procured by fraud committed in the midst of the arbitrators, may be reviewed. See *Bonar v Dean Witter Reynolds, Inc.*, 835 F.2d 1378, 1388 (11th Cir. 1988). The *Bonar* Court effectively dealt with the fraud because those arbitrators provided a written explanation to justify the award. *See, Id.* at 1385, "The arbitrators' written award, although brief, reflects the influence of Nix's testimony." With a written explanation of how fraud was corrected, courts may be conducted as required by Section 10 (a)(1) of the FAA to assure the arbitration process is free from fraud.

Accordingly, this Honorable Court is asked to establish the rule of law that when an allegation of fraud is an essential element of the finding, or when a party alleges to the arbitrators that fraud has been committed in their presence, the arbitrators must provide a

specific written finding to explain the fraud element of their award or the reason why the fraud was disregarded.

**B. The Petition Should Be Granted Because The Arbitration Panel Was Evidently Partial And The Arbitration Facilitator, The NFA, Intentionally Selected Arbitrators It Knew Were Biased, Contrary To Federal Arbitration Act § 10 (A)(2) Which Provides That The Award Must Be Vacated Where There Was Evident Partiality, Corruption, Or Both In The Arbitrators. 9 U.S.C. § 10 (A)(2).**

The lower courts disregarded the standard to review "evident partiality" announced by Mr. Justice Black, speaking for the majority in *Commonwealth,* as follows:

> ". . . we can see no basis for refusing to find the same concept (sic no pecuniary interest} in the broad statutory language that governs arbitration proceedings and provides that an award can be set aside on the basis of "evident partiality" or the use of "undue means ... (citation omitted) ... It is true that arbitrators cannot sever all their ties with the business world, ... but we should, if anything, be even more scrupulous to safeguard the impartiality of arbitrators than judges ...". *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 148 (1968).

The lower courts also stopped their quote of Mr. Justice White from the *Commonwealth* decision, to omit the following:

> "This does not mean the judiciary must overlook outright chicanery (sic by the arbitrators) in giving effect to their awards; that would be an abdication of our responsibility." *Id.* at 150.

Whether there is actual bias is a question of fact, *Toyota of Berkeley*, 834 F. 2d 751, 756 (9th Cir. 1987), *cert. Denied*, 480 U.S. 945, 107 S.Ct. 1602, 94 L.Ed. 2d 789 (1987), while evident

partiality is a legal question to be reviewed *de novo. Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145 (1968); *Pirsig v Pleasant Mound Mut. Fire Ins. Co.*, 512 N. W. 342, (Minn. App. 1994). And, "As the question of whether an arbitration panel has shown 'evident partiality' depends upon the unique factual circumstances of each arbitration proceeding, courts must perform a fact intensive inquiry on a case by case basis." (App D, page D-17).

Scott asserted before the NFA and continuously to the lower courts that those who are in the business to "collect debit balances from customers" have a pecuniary interest in the outcome which prevented them from granting a fair hearing to Scott, as a principal of a corporate general partner of a customer. Scott supported this position with the fact that all three of the arbitrators were selected from those who were not only experienced in the future commission merchant industry, but also directly engaged in the collection of balances from customers. See App. G, paragraph 14. A statement of Scott's objections follows:

> "The undersigned objects to all of the arbitrators selected for the following reasons:
>
> Peter J. Anderson, Esquire identifies his type of business or practice as the "Defense of Brokerage Firms". Prudential is a brokerage firm. Accordingly, Mr. Anderson is looking to firms like Prudential for his source of business. This arbitrator will be inclined to lean toward or favor the position of Prudential.
>
> David L. Prince, Esquire, identifies his employer as The Robinson - Humphrey Company, Inc. (Subsidiary of Shearson, Lehman Brothers, Inc.). This employer is in the same business as Prudential. This arbitrator has a vested interest, as General Counsel of a firm in the same business as the claimant, to further the legal positions taken by Prudential. This arbitrator is more than merely inclined to lean toward or favor the position of Prudential.

> Mr. Grahame Wood is an investment broker with A. G. Edwards & Sons, Inc. This employer is in the same business as Prudential. This employee is in the same position as Frank Pusateri, the broker which caused the loss to the Fund. This arbitrator is more than merely inclined to lean toward or favor the position of Prudential.
>
> These three arbitrators taken individually, or collectively, are unlikely to consider, must less provide an impartial hearing, for the position of a Commodity Pool Operator or its principal as opposed to the position of a brokerage firm. Prudential has a national presence and is likely to obtain favoritism from these arbitrators over this individual resident of Florida with no business connections or relationships in Atlanta, GA."

Assuming the arbitrators believed they could be impartial in regard to customer debit matters, they cannot overcome the subliminal knowledge that their livelihood depends on the ability of futures commission merchants to collect debit balances from their customers. The business connection by one of them would be sufficient evident partiality to vacate the award. *Schmitz v. Zilveti*, 20 F.3d 1043 (9th Cir. 1994). *Hobet Mining, Inc. v. UMWA*, 877 F. Supp 1011, 1018 (S.D.W.Va 1994).

The disclosure of disqualifying information from the arbitrators had no value to Scott because the NFA arbitrator selection procedures did not permit Scott to make any pre-emptive or other challenges as a matter of right. To have value, the disclosure of adverse information concerning an arbitrator must be combined with the right to cause the removal of that arbitrator. Accordingly, the question of "evident partiality" present in this case should be considered under the same rule of law as when the arbitrator fails to disclose the information. See *Middlesex Mut. Ins. Co. v Levine,* 675 F. 2d 1197, 1201, (11th Cir. 1982).

In addition to the specific challenge to the arbitrators, Scott alleged that because 18 to 21 of the 30 member NFA Board of Directors, in addition to the Chairman of the Board of the NFA, are from the FCM industry, and only 3 are from the commodity pool operator industry, that the three arbitrators were selected from the FCM industry by the NFA President to intentionally bias the outcome of the case in favor of Prudential, an FCM. The pierce of the corporate veil of the general partner, without any evidence in the arbitration record to justify that action, and the refusal of the arbitrators to either postpone the hearing or permit Scott to participate by telephone, in direct contravention of NFA Rule 9 (d)(10), which provides that "The Panel shall afford the parties every reasonable opportunity to present their case completely.", are evidence of the practice of evident partiality and bias against Scott.

The NFA further demonstrated it was evidently partial in favor of Prudential, by its appearance in the *Pipkin* case as an *amicus* to support the position of the FCM, the NFA brief was adopted by the FCM, and the NFA argued on behalf of the FCM. *Pipkin,* 64 F.3d at 259, n 1. These are the actions of a partial facilitator of arbitrations.

The issues to the arbitrators were presented by the Prudential standard customer agreements and procedures which are designed to be easily understood by the public. Accordingly, the case could have been resolved by arbitrators selected from a wide universe of available impartial persons.

**C. The Petition Should Be Granted Because The Arbitrators Were Guilty Of Misconduct By Refusing To Postpone The Hearing or Grant Scott's Petition to Participate by Telephone, Thereby Refusing To Hear Evidence Pertinent And Material To The Controversy; By Which Scott's Rights Were Prejudiced In Violation of the FAA. 9 U.S.C. § 10 (a)(3).**

The Prudential Motion to Compel Production of Documents and Scott's written objections were both timely filed. Though

Scott objected to the expense and asserted the documents were not relevant to the question of whether Scott committed fraud or had control the creation of the loss, the District Court ruled Scott should have anticipated that he would lose his Motion for Protective Order and should have had the documents ready to deliver. That is an unreasonable position and a misapplication of the NFA Rule 7 (b)(1) which specifically requires the parties to exchange documents no less than 15 days prior to the hearing. The grant of the Prudential Motion to Compel was a mere four days prior to the hearing. Scott did not have adequate time to comply. A scan of the record will disclose that the arbitrators held Scott's failure to produce the documents against him. Cassette of NFA Hearing.

On October 18, 1995, the Partnership filed a Petition for a Temporary Restraining Order (the "TRO"), Memorandum of Law, and Request for Hearing, with the request that they be given urgent consideration, to the United States District Court for the Southern District of Florida in the then pending case of *Prudential Securities, Inc. v. Creative Strategy Fund I, et al.*, at Case No. 95-8423-CIV-GRAHAM to enjoin the NFA arbitration against Scott from proceeding. On the same day, Scott advised the NFA of the filing of the TRO Petition; renewed his request for a stay of the October 31, 1996 hearing to permit the petition for TRO to be considered; and, requested the right to participate in the NFA arbitration hearing by telephone.

Scott, on advice of trial counsel, remained in Miami, Florida to be ready to attend the requested hearing on the Petition for a TRO. Scott was the only witness who could provide testimony to support the TRO Petition.

On October 25, 1995, the NFA staff advised Scott that his request for a stay was denied. On October 27, 1995, Scott's Motion to Participate in the NFA Hearing by Telephone was denied by the arbitrators.

The District Court found Scott could not make plausible explanation of why he did not appear for the arbitration hearing,

App D, page 21, without affording Scott the opportunity to be heard before that court. Scott objects to this finding by the Court because Scott did explain he was concentrating his efforts on an injunction to stay the arbitration. He knew, by review of the arbitrators backgrounds detailed above, that the arbitration outcome had been pre-determined. Of course had he known the TRO efforts would be unsuccessful, he would have been in Atlanta rather than Miami. However, Scott did not know the TRO had been denied until 5:10 p.m. on October 30. The arbitration commenced at 9 a.m. the next morning more than 400 miles away. And, as evidenced by the Circuit Court decision which ruled the courts should have decided the question of arbitrability, Scott was justified to file his Petition for a TRO and remain in Miami.

The arbitrators wrongfully denied Scott the opportunity to explain the relationship the Prudential power of attorney created between Prudential, Rowland, and the Partnership and why neither the General Partner nor any of its management, including Scott, had any control over the creation of the loss.

This case presents the opportunity for this Court to establish the guidelines to be used by the courts to determine arbitrator misconduct under FAA §10(a)(3).

**D. The Petition Should Be Granted Because The Arbitrators Exceeded Their Powers, Or So Imperfectly Executed Them, That A Mutual, Final, And Definite Award Upon The Subject Matter Submitted Was Not Made As Required By FAA §10 (A)(4).**

The arbitrators and the lower courts, in the conduct of their review, refused to consider Scott's well pled explanation of why it was not possible for him to have committed fraud or have control over the creation of the loss. See Scott's defenses attached to App G, paragraphs 3 & 4, and the lower court opinions, App. A and D.

Particularly, the 11th Circuit Court of Appeals said an analysis of the roles of the parties, as defined by the Commodity

Exchange Act, 7 U.S.C. §1, et seq, (the "CEAct"), and their contractual commitments were not necessary to understand the issues on appeal. App D, footnote 2, page D-15, *Scott v Prudential*, 141 F2d 1007, 1010, fn 2, (11th Cir. 1998). The Circuit Court further found "The facts of this case and the arbitrators award suggest that the arbitrators were convinced that Scott so dominated and controlled the Fund (*sic* "the Partnership) and CSI (*sic* the General Partner) that he ought to be held liable for their debts on a theory of alter-ego liability." App D, page D-14, *Id.*, 1018. Without an analysis of the parties and their relationships by either lower court, there could be no basis upon which they could have reached that conclusion. The arbitration record contains the facts.

Although the lower court did scan the record, the results of that review did not produce any explanation of the relationship of the power of attorney or the roles the parties played in the creation of the loss. The *de novo* review of questions of law required by FAA §10 (a)(4) was not satisfied by the lower courts. To find Scott personally liable, Prudential had the burden to prove Scott committed fraud and was in sufficient control to justify the pierce of the corporate veil of the General Partner. *Metge v Bachler*, 762 F.2d 621, 631(8th Cir. 1985), cert. Denied, 474 U. S. 1957, 106 S. Ct. 798, 88 L. Ed. 2d 774 (1986). *Brown v Enstar Group, Inc.*, 84 F. 3d 393, 396 (11th Cir. 1996). No such allegations were made by Prudential, much less proven.

Absent a written guarantee, the elements necessary to pierce the corporate veil to hold a shareholder, director, or officer personally liable for the debts of a corporation are clearly announced in the case of *Lowendahl v. Baltimore & Ohio Railroad Co.*, 247 App.Div. 144, 287 N.Y.S. 62, affirmed 272 N.Y. 360, 6 N.E.2d 56 and cited with approval in *Fisser v. International Bank*, 282 F. 2d 231 (2nd Cir. 1960) at page 238 as follows:

> "'Restating the instrumentality rule, we may say that in any case, except express agency, estoppel, or direct tort, three elements must be proved:

> '(1) Control, not mere majority or complete stock control, but complete domination, not only of finances, but of policy and business practice in respect to the transaction attacked so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own; and
>
> '(2) Such control must have been used by the defendant to commit fraud or worse, to perpetrate the violation of a statutory or other positive legal duty, or a dishonest and unjust act in contravention of plaintiff's legal rights; and
>
> '(3) The aforesaid control and breach of duty must proximately cause the injury or unjust loss complained of.' [247 App. Div. 144, 287.]"

Prudential was in complete control of the money on deposit. Prudential was in a better position to prevent the loss than was the Partnership, its General Partner, or Scott. Prudential agreed to accept this responsibility pursuant to the power of attorney.

No allegation was made by Prudential in its pleadings and no attempt was made to prove at the hearing that any activity of Scott was fraudulent, that he had control of the loss, or that either the limited partnership or the corporate general partner was a sham. The only evidence before the NFA was Scott's affidavit which proved that the partnership and the corporate general partner were genuine business entities and that Scott did not participate in the creation of the loss. *See* Defenses of Scott attached to App G.

Yet, without an analysis of the relationship of the parties or reference to the arbitration record, the Circuit Court concluded the arbitrators must have found that Scott had sufficient control to be personally liable for the Partnership loss. (App A, at page D-14). The decision by the 11th Circuit is contrary to the rule of law announced in *Metge, Id.* and correctly applied by the 11th Circuit in *Brown, Id.* The *Brown* case held that the chairman of the board of a corporation, although a controlling person of the corporation, was

not liable for a loss which occurred without his participation. *Brown*, 84 F.3d at 397. The 11th Circuit, the lower court, and the NFA arbitrators were obligated to conduct the analysis announced in *Metge*. However, in "manifest disregard for the law" and "in excess of their powers" in contravention of FAA §10 (a)(4), the arbitrators found, and the lower courts condoned the finding, that Scott was personally liable to Prudential by "piercing the corporate veil" of the general partner.

Without a specific finding of fraud or intentional wrong or other form of gross neglect, no personal liability can be attached to Scott, a mere employee of the corporate general partner, for the ordinary business losses sustained by Prudential for trades placed by an independent third party directly to Prudential. A corporation is presumed to be separate from its employees who do not commit fraud or intentionally abuse control of the business. *American Renaissance Lines, Inc. v Saxis S.S. Co.*, 502 F.2d 674, 677 (2d Cir 1974). No finding in the award or the decisions of the lower courts rebuts this presumption.

Scott's affidavit proved he had no involvement in the creation of the loss and his pleadings and affidavit were sufficient to protect all of his rights, including his Fifth Amendment and equal protection rights, which guarantee a record that reflects prima facie evidence of fraud and his control of the creation of the loss. *Zinemon v Burch*, 494 U.S. 113, 127 (1990).

Assuming, for argument sake, that Scott's pleading and affidavit were inadequate, the law provides that once he appeared and placed the allegations in the statement of claim at issue, the arbitrators cannot fail to require Prudential to put a prima facie case on the record. Prudential must proceed to prove its claim as if Scott had been present to try his case. *Ryan v Bening*, 66 Ill. App. 3d 127, 22 Ill.Dec. 873, 353 N. E. 2d 681, 683, (Ill. App. 5th District 1978); cited with approval in *Pickering v Owens-Corning Fiberglass Corp*. 265 Ill. App 3d 806, 203 Ill. Dec. 1, 638 N. E. 2d 1127, 1138, (Ill. App. 5th Dist. 1994). The purpose of establishing a

record is to perpetuate precisely what was considered. *United States v Russell*, 282 F. Supp. 106 (USDC ED Pa 1968).

Additionally, the lower courts were obligated, because of the claim by Scott that the award was arbitrary and capricious, to scan the record to determine if any basis for the award against Scott existed. *World Invest Corporation, et al, v Breen,* 684 So. 2nd 221 (Fla. App. 4th DCA 1996); *Ainsworth v. Skurnick,* 960 F.2d 939, 941 (11th Cir. 1992); *O. R. Sec. v Professional Planning Assocs.,* 857 F.2d 742 (11th Cir. 1988).

The burden of proof must be met by Prudential as a condition precedent to the confirmation of the award. No statement that this burden was satisfied is present in either lower court opinion.

This case should be reviewed because the Circuits have confused the "manifest disregard of the law" standard announced in *Wilko v Swan,* 346 U.S. 427, 436-437, 74 S.Ct. 182, 187-188, 98 L.Ed. 168 (1963) and the "exercise of excessive powers" justification to vacate an arbitration award provided in FAA §10 (a)(4). Contrast App. A, page A-34. N 21 and *Montes v Shearson Lehman Bros., Inc.* 128 F.3d 1456 (11th Cir. 1997) with *Wilko, id.*

## III.

## THE PETITION MUST BE GRANTED TO ESTABLISH UNIFORM NON-STATUTORY REASONS TO VACATE AN ARBITRATION AWARD AMONG THE CIRCUITS.

### A. The Arbitrators' Award Is Arbitrary And Capricious

The "arbitrary and capricious" test to vacate an arbitration award requires review and explanation by this Court to permit uniform application to all Petitions to Vacate filed in all circuits. Currently, this Court and the circuits are divided in the application of this test. See *Wilko v Swan*, 346 U. S. 427, 74 S. Ct. 182, 98 L.Ed. 168 (1953) and *Shearson Hayden Stone, Inc. v Liang,* 653 F.

2d 310, 312 (7th Cir. 1988) (refusal to consider vacatur of an award "as completely irrational") as contrasted with *Ainsworth v Skurnick*, 960 F.3rd 939 (11th Cir. 1992) which applied the "arbitrary and capricious" test when a scan of the record demonstrated the award was not supported by the evidence. Review by this Court is justified because the Circuits are divided and the 11th Circuit has misapplied the "arbitrary and capricious" test announced in *Ainsworth, id.*

**B. The Arbitrators' Award Was Entered In Manifest Disregard Of The Law.**

Investors who also intend to manage start-up and other high risk business endeavors must be able to rely upon the corporate structure and the delegation of responsibilities to third parties to insulate them from personal liability, or they will soon refrain from these endeavors. The facts and applicable law of this case justify review to provide notice to the entrepreneurial community of the basis upon which arbitrators can find investor/managers personally liable for the ordinary debts of a corporation. (App. A).

## IV.

## THE PETITION MUST BE GRANTED BECAUSE SCOTT WAS DENIED ACCESS TO THE COURTS AS GUARANTEED BY THE CONSTITUTIONS OF THE UNITED STATES AND THE STATE OF FLORIDA

The NFA filing fee of $5,075 for a claim is excessive. This violates the equal protection guarantees of the Florida and Federal Constitutions. There can be no equal justice when the right to file suit depends on one's ability to pay. Chief Justice Barkett concurring opinion in *Psychiatric Associates v. Siegel*, 610 So.2d 419, 426 (Fla 1992) citing *Griffin v. Illinois*, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956).

The NFA is a government body. *Prudential v Scott*, District Court Order of July 18, 1996, n. 24, page 38 (App D, page 38);

*R.J. O'Brien & Assoc. v Pipkin*, 64 F.3d 257, 262, (7th Cir. 1995). A government body cannot take Scott's property in violation of the due process clause of the Fifth Amendment to the United States Constitution, *Aetna Life Insurance Co. v Lavoie,* et al, 475 U.S. 813, 822 or Article I, Sections 2, 9 and 21, of the Florida Constitution (1968). *Carter v. Sparkman*, 335 So.2d 802, 805 (Fla 1976); *G.B.B. Investments, Inc. v. Hinterkopf* 343 So.2d 899 (3rd DCA 1977).

Scott has asserted to the arbitrators and the District Court that the excessive filing fee violated his due process rights under the U. S. and Florida Constitutions. Yet, the Circuit Court ruled that this statement was insufficient to preserve his right to equal protection under the laws. App. A, page 36, n 22.

## V.

## THE PETITION MUST BE GRANTED BECAUSE THE DISTRICT COURT WRONGFULLY DENIED SCOTT THE OPPORTUNITY TO FILE HIS RESPONSE TO PRUDENTIAL'S MOTION TO CONFIRM THE AWARD.

The Order of July 18, 1996 admitted the Cassette recording of the arbitration hearing prepared by the NFA to the record of this case.

On April 8, 1996, the District Court entered an Order which preserved the right of Scott to file his reply to the response of Prudential within ten days after the record of the NFA proceedings was admitted to the record.

On April 12, 1996, the lower court denied the admission of the written transcript submitted by Scott for failure to be properly authenticated.

On April 22, 1996, proper authentication was submitted by the NFA directly to the lower court clerk for the audio recording (the "Cassette") of the proceeding.

The right to file a response provided in the Court's Order of April 8 was preserved by filing on April 22, 1996 the authentication of the recording of the NFA proceeding. This filing was within the time permitted to seek a Reconsideration of the Order of April 12, 1996. The admission of the Cassette by the Order of July 18, 1996 was a grant of the Reconsideration of the April 12, 1996 denial for failure of the written transcript because it had not been properly authenticated.

By the Order of July 18, 1996 which admitted the Cassette, the District Court, without affording Scott the right to file a Response to the Prudential Pleading, resolved all outstanding issues on the merits of the Prudential omnibus pleading which contained the Petition to Vacate and Prudential's Petition to Confirm. The first notice to Scott of the admission of the Cassette and his right to file a responsive pleading pursuant to the April 8, 1996 Order was his receipt of the District Court's July 18, 1996 Order.

This was a mistake of law and the decision of the District Court should be reversed to permit Scott to file his Response to the Prudential omnibus pleading and to, thereafter, have full consideration of his position on the merits.

## VI.

## THE PETITION MUST BE GRANTED BECAUSE THE AWARD IS IN CONTRAVENTION OF THE FLORIDA STATUTE OF FRAUDS

Scott did not provide Prudential with his personal guarantee for the debts of the Limited Partnership or its general partner. During the NFA hearing, one of the arbitrators specifically asked counsel for Prudential if Prudential obtained the personal guarantee of Scott for the debts of the partnership. Counsel for Prudential answered that Prudential had not obtained such guarantee. Cassette.

> Title 41 section 725.01 of the Florida Statutes provides: "No action shall be brought whereby to charge ... the defendant upon any special promise to answer for the debt, default or miscarriage of another person ... unless the agreement or promise upon which such action shall be brought, or some note or memorandum thereof shall be in writing and signed by the party to be charged therewith or by some other person by him thereunto lawfully authorized."

In the case of *First Guaranty Corporation v Palmer Bank and Trust Company of Fort. Meyers, N.A.*, 405 So.2d 186, 188 n. 1-4 the Court found that a series of unsigned documents together with a signed, but incomplete loan agreement, would not satisfy the requirements of the assumption of the debt of another and quoted Fla. Stat. 725.01 as follows:

> "The statute of frauds requires a written contract guaranteeing the debt of another to be signed by the person to be charged. Section 725.01, Fla. Stat. (1979)."

In the *First Guaranty* case the trial court permitted First Guaranty to introduce parol evidence to explain the terms of a loan agreement signed by Palmer Bank which contained blank spaces. The Second District Court of Appeals overruled the trial court to hold that "Where, however, the Court, to supply the essential information, would have to re-write the contract for the parties, the ambiguity is patent and parol evidence is inadmissible." Citing *Ace Supply Co. v. Tera Nova Electric, Inc.* 288 So.2d 544 (Fla 1st DCA 1974); *Patterson v. Taylor*, 123 So.2d 389 (Fla. 3rd DCA 1960).

None of the legal elements required to pierce the corporate veil announced in *Lowendahl v. B & O RR*, 272 N.Y. 360, 6 N.E.2d 56, *supra*, were plead or proved by Prudential before the arbitrators.

There is no writing signed by Scott to assume the indebtedness of the Partnership to Prudential. To enable Prudential

to recover would require parol evidence to make an agreement between the parties, when none exists. No evidence was produced at the NFA arbitration hearing which would justify the finding that Scott was personally responsible for the Partnership debt to Prudential.

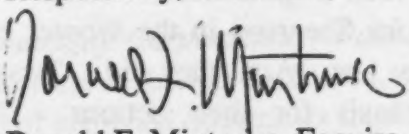
The NFA arbitrators demonstrated their recognition of the requirement of a written guarantee of the account by a question to counsel for Prudential who confirmed on the record that Scott had not provided a guarantee. Counsel for Prudential, as did the attorney for Shearson in the *Montes* case, urged the arbitrators to ignore the law. And, they did. Cassette and App G. They must have a basis for their actions. *Jenkins v Prudential-Bache Securities, Inc.* 847 F.2d 631 (10th Cir. 1988). The question of whether a promise to pay the debts of another is sufficient to support a cause of action is one of law for the Court to determine. *Sanders v. Hodges, et al.* 147 So. 571. And, the arbitrators must not disregard the law. *Montes v Shearson Lehman Bros., Inc.* 128 F. 3d 1456 (11th Cir. 1997). The lower courts did not discuss, much less resolve, the Statute of Frauds defense Scott presented to the arbitrators and preserved in his Petition to Vacate and subsequent appeal to the 11th Circuit.

## CONCLUSION

Prudential has a long history of abuses to its customers and the legal process. *See In Re Prudential Securities, Inc. Limited Partnership Litigation,* 930 F Supp. 68 (S.D.N.Y. 1996); *Serpent on the Rock,* Kurt Eichenwald, HarperCollins Publishers, Inc., 10 East 53rd Street, New York, New York 10022, ISBN 0-88730-720-5. In addition to its history of civil abuses, Prudential recently completed three years probation to avoid criminal prosecution for its wrongs to customers. See *United States of America v. Prudential,* USDC for the So. Dist. of NY at Magistrate No. 94-2189. When high-profile organizations with a national presence, like Prudential, are permitted to commit the wrongful conduct detailed in this Petition, confidence in the administration of justice deteriorates.

This Court is requested to accept review of this case to: (i) preserve the use of limited partnerships and other forms of enterprise which are intended to limit personal liability; (ii) require arbitration procedures to provide for a fair hearing; and, (iii) establish rules of law to ensure that awards which involve fraud and other alleged misconduct receive meaningful review by the courts.

Respectfully, submitted,



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**In the**
**SUPREME COURT OF THE UNITED STATES**
**OCTOBER TERM, 1998**

---

**William Sumner Scott,**

**Petitioner**

**v.**

**Prudential Securities, Inc.,**

**Respondent**

## CERTIFICATE OF SERVICE

The undersigned, a member of the bar of this court, hereby certifies that on this 22 day of October, 1998, the original and 39 copies of the foregoing Petition for Writ of Certiorari were sent by U.S. First Class Mail, postage prepaid, to The Clerk of the Supreme Court of the United States, One First Street, N. E., Washington, D.C. 20543 and that two service copies were sent by the same method, to counsel for Prudential, Robert G. Brunton, Esq., Kutak Rock, Suite 2100, 225 Peachtree Street, NE, Atlanta, GA 30303, and Greg J. Brietbart, Esquire, and to: Gregg G. Breitbart, Esquire Kirkpatrick & Lockhart LLP, 201 S. Biscayne Blvd., 20th Floor Miami, Fl 33131.

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U.S. 11th Circuit Court of Appeals

# SCOTT v PRUDENTIAL

United States Court of Appeals,
Eleventh Circuit.

No. 96-9106.

William Sumner SCOTT,
Plaintiff-Appellant,

v.

PRUDENTIAL SECURITIES, INC.,
Defendant-Appellee.

May 18, 1998.

Appeal from the United States District Court
for the Northern District of Georgia.
(No. 1:95-CV-3284-JEC), Julie E. Carnes, Judge.

Before BIRCH, Circuit Judge, FAY, Senior Circuit Judge, and COHILL[1], Senior District Judge.

BIRCH, Circuit Judge:

In this appeal, we decide whether the Member Arbitration Rules of the National Futures Trading Association ("NFA") permit NFA arbitrators to decide whether a dispute is arbitrable. We must also address whether an individual consents to arbitrate disputes with other members of the NFA by becoming an associate member of the NFA. In addition, the petitioner-appellant asks us to vacate the arbitration award entered below pursuant to section 10 of the Federal Arbitration Act, 9 U.S.C. § 10, and on the non-statutory ground that the award was arbitrary and capricious.[1] The district court held that the arbitrators did have the authority to determine



APPENDIX A

issues of arbitrability but, upon conducting an independent review, the court made an alternative holding that the dispute was indeed subject to NFA arbitration. The district court also rejected Scott's attacks on the arbitrators' award and refused to vacate the award. Finally, the district court granted the respondent-appellee's motion to confirm the award. Although we hold that the district court erred when it found that the arbitrators had the authority to decide issues of arbitrability, we agree with the district court's alternative holding and its decision to confirm the arbitration award. We AFFIRM.

## BACKGROUND

William S. Scott ("Scott"), the petitioner-appellant, formed a Delaware corporation, Creative Strategies, Inc. ("CSI"), that acted as the general partner of a Pennsylvania limited partnership, the Creative Strategy Fund I, (the "Fund"). Scott was the sole shareholder of CSI and the sole limited partner of the Fund. The Fund subsequently opened a number of accounts with the respondent-appellee, Prudential Securities, Inc. ("PSI"), for the purpose of engaging in futures trading. Scott executed all the documents required to open these accounts but structured the transactions with the intent of avoiding personal liability for any deficits in the accounts.[2] He specifically refused PSI's request that he execute a personal guarantee on the accounts.

These accounts lost a significant amount of money due to what Scott alleges were PSI's mistakes in trading the accounts on a margin. Scott further alleges that instead of correcting the mistakes, PSI forged documents to support the transactions and demanded payment for the deficit in the accounts. PSI then issued a demand for arbitration before the NFA against Scott, the Fund, and CSI. In October, 1992, the Fund filed a complaint with the Commodity Futures Trading Commission ("CFTC"), alleging that PSI had committed a number of transgressions in connection with the accounts and claiming damages. PSI responded by filing a counterclaim in the CFTC proceeding that demanded payment of the debit balances from Scott, the Fund, and CSI. The CFTC, however, refused to consider PSI's claims against Scott

individually, and the NFA granted a stay of PSI's arbitration proceedings pending the outcome of the CFTC hearing.

In 1994, an administrative law judge (the "ALJ") for the CFTC decided that the allegations regarding PSI's conduct were without merit and entered an award of $101,087.53 plus interest in PSI's favor. In 1995, the CFTC heard an appeal of the ALJ's decision and affirmed it in all material respects.[3] At PSI's request, the NFA then lifted the stay in the arbitration proceedings that PSI had initiated against Scott in his personal capacity and notified both parties that arbitration would commence on October 31, 1995.

On October 18, 1995, Scott petitioned the NFA to delay the arbitration pending the outcome of a motion the Fund had filed in the United States District Court for the Southern District of Florida seeking a temporary restraining order ("TRO") to enjoin the NFA proceedings. Scott also petitioned the NFA staff for the option of participating in the arbitration by telephone. On October 25, 1995, the NFA denied Scott's request for a stay, and, on October 27, 1995, the arbitrators' denied Scott's request to participate by telephone. On October 30, 1995, the district court in Florida denied the Fund's request for a TRO to enjoin the NFA arbitration. The arbitrators subsequently commenced their hearing on October 31, 1995, in Scott's absence. That morning, the arbitrators also refused an attempted phone call from Scott, who sought either a delay in the hearing or the option of participating by telephone. The arbitrators did, however, accept and consider a fifty-six page affidavit detailing Scott's position on the dispute.

On November 20, 1995, a three-person NFA arbitration panel found that the Fund and CSI were Scott's "alter-egos" and pierced the corporate veil to hold Scott liable for the debts of those entities. The arbitrators awarded PSI $106,087.54 plus interest against Scott personally. Scott brought a motion to vacate the arbitration award in the United States District Court for the Northern District of Georgia; PSI brought a motion to confirm the arbitration award. After a resolving a number of procedural disputes,[4] the district

court granted PSI's motion to confirm the award and denied Scott's motion to vacate.

## DISCUSSION

On appeal, Scott argues that the district court erroneously decided that the NFA's Member Arbitration Rules gave the NFA arbitrators the authority to resolve disputes about arbitrability (*i.e.,* whether a particular dispute is subject to arbitration). Scott also appeals the district court's alternative holding that, even if the NFA arbitrators did not have the power to decide issues of arbitrability, the alter-ego liability dispute between PSI and Scott was nonetheless subject to arbitration. Finally, Scott attacks the arbitrators' award on a number of different grounds and asks us to vacate the award pursuant to section 10 of the FAA, because the award was arbitrary or capricious, and because the NFA's filing fees violated his rights under the Florida Constitution. PSI defends the district court's opinion and the NFA arbitrators' award on all grounds and asks us to affirm the district court's confirmation of the award.

### I. Arbitrability of the Dispute

Scott argues that the NFA arbitrators did not have the authority to enter a judgment in his dispute with PSI. It is well established that arbitration is a creature of contract and no party can be compelled to submit a dispute to arbitration without having given prior contractual consent to do so. *See AT & T Tech., Inc. v. Communications Workers,* 475 U.S. 643, 649, 106 S.Ct. 1415, 1418, 89 L.Ed.2d 648 (1986). Although the United States Supreme Court has made it clear that, the courts, not arbitrators, ordinarily will decide whether or not a particular dispute is arbitrable, the parties may choose to have arbitrators resolve even the question of arbitrability. *Id.* at 649, 106 S.Ct. at 1418 (unless the parties "clearly and unmistakably" provide otherwise "the question of arbitrability-whether ... [an arbitration] agreement creates a duty for the parties to arbitrate the particular grievance-is undeniably an issue for judicial determination."). The arbitrators in this case, by entering an award against Scott on the merits, implicitly decided

that they had the power to decide questions of arbitrability and decided that the dispute was arbitrable. As we must defer to the arbitrators' conclusion that the dispute was arbitrable only if we agree that the parties clearly and unmistakably consented to have them decide issues of arbitrability, *see First Options of Chicago, Inc. v. Kaplan,* 514 U.S. 938, 943, 115 S.Ct. 1920, 1923, 131 L.Ed.2d 985 (1995), we will address that question first.

A. *Competence de la Competence*

In this case, section 2 of NFA Member Arbitration Rules, which requires all members and associates to arbitrate disputes, provides the only possible justification for the arbitrator's implicit conclusion that they had the authority to resolve questions of arbitrability.[5] Scott, however, argues that the language in the NFA rules is not broad enough to permit the arbitrators to decide the issue of arbitrability.

The Supreme Court has explained that courts should not assume that parties have agreed to arbitrate arbitrability unless there is clear and unmistakable evidence to that effect. *See First Options,* 514 U.S. at 944, 115 S.Ct. at 1924 (quoting *AT & T Tech.,* 475 U.S. at 649, 106 S.Ct. at 1418-19). To determine whether the parties agreed to submit the question of arbitrability to the arbitrators, we must refer to "ordinary state-law principles that govern the formation of contracts." *First Options,* 514 U.S. at 944, 115 S.Ct. at 1924.

Regrettably, neither the parties nor the district court have dwelt on the question of *which* state's principles of contract law govern this question. Scott apparently executed a Form 8-R, the document that registered him with the NFA, in Florida and sent it to the NFA in Illinois. Given that none of the relevant documents appears to contain a choice of law provision, it would appear that either Florida or Illinois law applies.[6] We, however, need not resolve this choice of law problem because the relevant law in both states is essentially in harmony. Both Florida and Illinois require courts to interpret a contract so as to give effect to the intent of the parties.

*See e.g., Mayflower Corp. v. Davis,* 655 So.2d 1134, 1137 (Fl.Dist.Ct.App.1994) ("The intention of the parties governs the construction of contracts."); *American States Ins. Co. v. Koloms,* 177 Ill.2d 473, 227 Ill.Dec. 149, 152, 687 N.E.2d 72, 75 (1997) (same). More specifically, courts in both states have concluded that even broad, elastic language in an arbitration clause cannot, without more, support the clear and unmistakable conclusion that the parties intended to submit issues of arbitrability to arbitrators. The Supreme Court of Illinois, for example, recently held that a contract providing that "any controversy between us arising out of ... this agreement shall be submitted to arbitration" was "at best, silent on the question of who should decide questions of arbitrability." *Roubik v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 181 Ill.2d 373, 230 Ill.Dec. 1, 692 N.E.2d 1167 (1998). A Florida court interpreting substantially similar contract language also held that the parties had not evidenced an intent, as a matter of Florida contract law, to permit the arbitrators to decide issues of arbitrability:

> The agreement in this case does not contain any language specifically authorizing the arbitration panel to decide arbitrability issues; nor does it contain any broad or all-inclusive language that implicitly authorizes the arbitration panel to decide such issues.

*Romano v. Goodlette Office Park, Ltd.,,* 700 So.2d 62, 64 (1997); *accord North Augusta Assoc. Ltd. Partnership v. 1815 Exchange, Inc.,* 220 Ga.App. 790, 469 S.E.2d 759 (1996) (same under Georgia law). *But see Smith Barney Shearson, Inc. v. Sacharow,* 91 N.Y.2d 39, 689 N.E.2d 884, 666 N.Y.S.2d 990 (1997) (reaching the opposite conclusion under New York law).[7]

Section 2 of the NFA's arbitration rules states that: "[e]xcept as provided in Sections 4 and 5 of these Rules ..., disputes between and among Members and Associates shall be arbitrated under these Rules...."[8] R1-7, Ex. G at 4. The language at issue in this case, therefore, is substantially narrower than the arbitration clauses discussed in the Illinois and Florida decisions above. Although we

admit that the language of section 2 is susceptible to a reasonable construction in favor of permitting the arbitrators to determine arbitrability, we cannot conclude that section 2 evidences a "clear and unmistakable" commitment to that position under either Florida or Illinois principles of contract construction. Accordingly, we hold that the arbitrators did not have the power to rule on the question of whether Scott had consented to arbitrate.

B. The District Court's Determination of Arbitrability

Given our decision that the parties did not consent to have the arbitrators determine whether their dispute was arbitrable, we now must make an independent determination of whether the parties' dispute was eligible for arbitration. *See First Options,* 514 U.S. at 943, 115 S.Ct. at 1924. In an alternative holding, the district court expressly found that Scott had consented to arbitrate his dispute with PSI by virtue of his registration with the CFTC and his status as an associate member of the NFA. As we conduct our review of this alternative holding, we accept all findings of fact that are not clearly erroneous but decide questions of law *de novo. Id.* at 947-48, 115 S.Ct. at 1926.[9]

Scott argues that he never agreed to arbitrate disputes in front of the NFA. As we observed in *United States Fidelity & Guar. Co. v. West Point Constr. Co.,* 837 F.2d 1507, 1508 (11th Cir.1988) (per curiam), however, parties may bind themselves to arbitrate disputes by signing a contract that incorporates an arbitration agreement by reference. Moreover, in a case substantially similar to the one before us, another Court of Appeals has held that a petitioner who registered as an associate member of the NFA consented to arbitrate all disputes with other members or associates pursuant to the NFA Member Arbitration Rules that had been incorporated in his registration. *See R.J. O'Brien & Assoc. v. Pipkin,* 64 F.3d 257, 260-261 (7th Cir.1995).

Following the *Pipkin* court's reasoning, the district court found that Scott was a CFTC-registered associated person.[10] Indeed, Scott admitted as much in the documents he filed with the district court,

curiam). Scott, as the moving party, bears the burden of setting forth sufficient grounds to vacate the arbitration award. *See O.R. Sec., Inc.,* 857 F.2d at 746. Finally, as explained above, we accept the district court's findings of fact to the extent they are not clearly erroneous and review questions of law *de novo. See Marshall & Co.,* 114 F.3d at 188.

A. Statutory Grounds

Section 10 of the FAA provides a number of specific statutory bases for vacating an arbitration award.[15] Scott urges us to vacate the NFA's arbitration award on the following three grounds: (1) the arbitration award was procured by fraud, *see* 9 U.S.C. § 10(a)(1); (2) the arbitrators exhibited evident partiality, *id.* § 10(a)(2); and (3) the arbitrators were guilty of misconduct, *id.* § 10(a)(3). We find Scott's arguments concerning fraud before the arbitrators to be without merit,[16] but address his remaining contentions in turn.

First, Scott asserts that the district court should have vacated the arbitration award because the arbitrators were biased against him. Section 10 of the FAA permits vacatur "where there was evident partiality or corruption in the arbitrators." 9 U.S.C. § 10(a)(2). To vacate an arbitration award for evident partiality, the moving party must present evidence that would support a "reasonable impression of partiality" on the arbitrator's behalf. *See Lifecare Int'l, Inc. v. CD Med., Inc.,* 68 F.3d 429, 433 (11th Cir.1995), *modified on other grounds,* 85 F.3d 519 (11th Cir.1996). The assertion of partiality, however, must be "direct, definite and capable of demonstration rather than remote, uncertain and speculative." *Id.* (quoting *Middlesex Mut. Ins. Co. v. Levine,* 675 F.2d 1197, 1202 (11th Cir.1982)).

Scott's allegations of partiality arise out of the fact that each of the arbitrators in his case are in the business of collecting debit balances from customers.[17] Scott, therefore, alleges that because he sought to avoid the collection of such a debit he could not receive a fair hearing before the arbitrators in question. As evidence in support of his contentions, Scott attacks the arbitration award

against him and argues that it is so unsupported by the law that it could have only been the product of partiality.[18]

Scott's claims amount to precisely the vague, remote, and speculative charges that we have held cannot support an order to vacate an arbitration award. Scott's allegations attack only the nature of experience that the arbitrators have in the commodities trading business and assume a bias against his position. The courts have repeatedly explained, however, that an arbitrator's experience in an industry, far from requiring a finding of partiality, is one of the factors that can make arbitration a superior means of resolving disputes. *See, Commonwealth Coatings Corp. v. Continental Cas. Co.*, 393 U.S. 145, 150, 89 S.Ct. 337, 340, 21 L.Ed.2d 301 (White, J., concurring) ("It is often because they are men of affairs, not apart from but of the marketplace, that they are effective in their adjudicatory function."). Moreover, Scott has neither pointed us to any evidence of either actual bias on the part of the arbitrators nor identified any business connection to PSI that the arbitrators failed to disclose to the parties before undertaking the dispute.[19] Accordingly, we affirm the district court's decision not to vacate the arbitration award for evident partiality.

Second, Scott argues that the NFA arbitrators, by refusing to postpone the arbitration hearing and refusing to allow Scott to participate by telephone, were guilty of misconduct. The FAA permits a district court to vacate an arbitration award in the event that: (1) the arbitrators refused to postpone the hearing upon the showing of sufficient cause; (2) the arbitrators refused to hear pertinent and material evidence; or (3) the arbitrators were guilty of any other misbehavior that resulted in prejudice to the rights of any party. *See* 9 U.S.C. § 10(a)(3). As the district court correctly observed, however, a mere difference of opinion between the arbitrators and the moving party as to the correct resolution of a procedural problem will not support vacatur under section 10(a)(3). *See generally Robbins v. Day,* 954 F.2d 679, 685 (11th Cir.1992) ("An arbitrator enjoys wide latitude in conducting an arbitration hearing."), *overruled on other grounds, First Options,* 514 U.S. at 948, 115 S.Ct. at 1926. Moreover, we must recall the basic policy

behind arbitration, which is to permit parties to resolve their disputes in an expeditious manner without all the formalities and procedures that might attend full fledged litigation. *See Schmidt v. Finberg,* 942 F.2d 1571, 1573 (11th Cir.1991).

We note that the express language of the statute requires the party seeking a postponement to advance a "sufficient cause" for the delay. 9 U.S.C. § 10(a)(3). In reviewing an arbitrator's refusal to delay a hearing, we must decide whether there was "any reasonable basis" for failing to postpone the hearing to receive relevant evidence. *Schmidt,* 942 F.2d at 1574. In *Schmidt,* for example, we held that an arbitration panel's possible reliance on any one of a number of factors, including the desire for an expeditious resolution of the dispute, justified its refusal to postpone a hearing to accommodate a party's competing scheduling obligations and, therefore, did not require the vacatur of an arbitration award. *Id.* at 1574-74; *see also ARW Exploration Corp. v. Aguirre,* 45 F.3d 1455, 1464 (10th Cir.1995) (party's "flimsy" claim of unavailability due to overseas travel was insufficient to require delay of the arbitration); *accord Hilliard v. J.C. Bradford & Co.,* 229 Ga.App. 336, 494 S.E.2d 38, 44 (1997) (a flare-up in a party's long-term, stress related illness the evening before a scheduled arbitration hearing did not require a postponement).

In this case, the district court found that Scott had not advanced any compelling excuse for his absence before the arbitrators on October 31, 1995. Scott argued that he could not appear before the arbitrators in Atlanta because the demands of ongoing litigation in Miami required his presence there. The evidence is undisputed, however, that Scott was under no *court imposed* obligation to stay in Miami.[20] Moreover, the district court in Miami rejected Scott's application for a TRO to enjoin the arbitration on October, 30, 1995, the day before the arbitration was to begin. Scott's arguments amount to nothing more than the self-imposed scheduling obstacles that we have held do not require an arbitrator to postpone a hearing. Accordingly, we affirm the district court's decision on this point.

Next, Scott argues that the arbitrators committed misconduct by refusing to allow him to participate in the arbitration hearing by telephone. Whether we consider this argument as a refusal to consider pertinent evidence or as "other misbehavior," under section 10(a)(3), we note that Scott must show that the arbitrators' refusal to permit him to participate by telephone caused him some prejudice. *See Marshall & Co.,* 941 F.Supp. at 1212. An arbitrator need not consider all the evidence the parties seek to introduce but may reject evidence that is cumulative or irrelevant. *See Robbins,* 954 F.2d at 685. Scott argues that, had he been permitted to participate by telephone, he would have been able to explain how PSI had disregarded the limitations on the Fund's accounts. This evidence, however, was irrelevant to the question of alter-ego liability before the NFA arbitrators. Accordingly, the arbitrators did not refuse to consider pertinent evidence by refusing Scott's participation by telephone.

Finally, the arbitrators did not engage in misconduct that denied Scott his right to a fair hearing. As we observed in *Robbins,* the FAA permits arbitration to proceed "with only a summary hearing and with restricted inquiry into factual issues.... [The arbitrator] need only give each party *the opportunity* to present its arguments and evidence." 954 F.2d at 685 (emphasis added) (citations omitted). Although the arbitrators refused Scott's participation by telephone, the arbitrators did conduct a hearing, of which Scott had notice and the opportunity to attend, and they considered Scott's fifty-six page affidavit setting out his arguments and evidence. Accordingly, we find no misconduct on the part of the arbitrators and affirm the district court's decision not to vacate the arbitration award on the statutory grounds.

B. Non-Statutory Grounds

In addition to the grounds for vacatur set out in the FAA, the courts have recognized a number of non-statutory grounds that permit a district court to vacate an arbitration award. In the Eleventh Circuit, a party may challenge an arbitration award without reliance on the FAA if the award is: (1) arbitrary and capricious; (2) in

contravention of public policy; or (3) entered in "manifest disregard of the law." *See Montes v. Shearson Lehman Bros., Inc.,* 128 F.3d 1456 (11th Cir.1997) (describing the first two grounds and adopting the third). On appeal, Scott has limited his argument to his contention that the arbitrators' award was arbitrary and capricious.[21]

An arbitration award will not be held to be arbitrary and capricious unless "a ground for the arbitrator's decision can[not] be inferred from the facts of the case." *Raiford v. Merrill Lynch, Pierce, Fenner & Smith,* 903 F.2d 1410, 1413 (11th Cir.1990) (internal quotation omitted). In *Raiford,* for example, we held that the arbitrators' calculation of a damage award was not arbitrary and capricious because, although the arbitrators had not given any explanation of their award, "the arbitrators *could have* fashioned their award based on any number of valid reasons." *Id.* (emphasis added). Similarly, in this case, it is not difficult to discern a reason for the arbitrators' decision to hold Scott liable for the debts of the Fund. The facts of this case and the arbitrators' award suggest that the arbitrators were convinced that Scott so dominated and controlled the Fund and CSI that he ought to be held liable for their debts on a theory of alter-ego liability. Scott's attempts to argue that this conclusion was arbitrary and capricious amount to nothing more than a rehashing of his disagreements with that result. As we have observed before, a mere error in the application of the law will not support the reversal of an arbitration award. *See Montes,* 128 F.3d at 1460. Accordingly, we hold that the district court correctly denied Scott's pleas to vacate the arbitration award.[22]

## CONCLUSION

On appeal, Scott asks us to reverse the district court's ruling that the NFA's Member Arbitration Rules gave the arbitrators the power to resolve issues of arbitrability. He also asks that we reverse the district court's alternative, independent holding that his status as an associate member of the NFA required him to arbitrate this dispute with PSI. Finally, he urges us to vacate the arbitration award for a variety of statutory and non-statutory reasons. We hold that the

district court erred when it found that the NFA Member Rules gave the arbitrators the authority to determine whether the dispute was subject to arbitration. We agree, however, with the district court's independent holding that Scott's association with the NFA required him to arbitrate the dispute with PSI. We also find no error in the district court's decision to deny Scott's motion to vacate the arbitration award or its decision to confirm that award in PSI's favor. Accordingly, we AFFIRM the decision of the district court.

FOOTNOTES

[1]:Honorable Maurice B. Cohill, Senior U.S. District Judge for the Western District of Pennsylvania, sitting by designation.

[1]:Although the petitioner-appellant raises a number of additional challenges both to the arbitration award and to the district court's rulings below, we conclude they are without merit and decline to discuss them further.

[2]:Since the details of these arrangements are both lengthy and complex, we confine our discussion to the details necessary to understand the issues on appeal.

[3]:The CFTC's confirmation of the ALJ's decision spawned a considerable amount of additional litigation. Suffice it to say that another panel of our court affirmed the award without opinion. *See Prudential v. Creative Strategy,* 107 F.3d 26 (11th Cir.1997).

[4]:Scott raises a number of these procedural disputes on appeal and asks us to reverse the district court's rulings. Upon review, we find his contentions to be without merit.

[5]:Scott's arguments that he was not bound by the NFA's arbitration rules go to the issue of whether the arbitrators erred by finding that he had agreed to arbitrate the merits of the dispute rather than the issue of *who* should have decided that question. Accordingly, we leave Scott's argument on that point for subsequent discussion in part I(B).

[6]:It is axiomatic that a federal district court, sitting in diversity, applies the choice of law rules of the state in which it sits. *See Klaxon Co. v. Stentor Elec. Mfg. Co.,* 313 U.S. 487, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941). Since the parties brought this case in the Northern District of Georgia, we observe that, in cases of contract construction, Georgia applies the law of the state where the parties made their agreement or where it is to be performed. *See Allstate Ins. Co. v. Duncan,* 218 Ga.App. 552, 553, 462 S.E.2d 638, 640 (1995). On the record in this case, therefore, either Florida or Illinois law applies. We note that, although the question of which state's law should govern this question is an important one, the courts have not focused upon this issue. *See e.g., Paladino v. Avnet Computer Tech. Inc.,* 134 F.3d 1054, 1061 n. 1 (11th Cir.1998) (Tjoflat, J. and Cox, J. concurring)(noting that the parties had not specified which state's law should apply in a similar situation); *Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Cohen,* 62 F.3d 381 (11th Cir.1995) (deciding that the parties had not clearly and unmistakably agreed to arbitrate arbitrability without a single reference to state law).

[7]:*But see also PaineWebber Inc. v. Bybyk,* 81 F.3d 1193, 1199 (2d Cir.1996) ("The words "any and all' are elastic enough to encompass disputes over whether ... a claim is within the scope of arbitration.").

[8]:Section 2 contains a number of additional exceptions, none of which are relevant to this appeal. *See* R1-7, Ex. G at 4.

[9]:We note that the Supreme Court has rejected our circuit's previous practice of reviewing a district court's decision to confirm an arbitration award with the more lenient abuse of discretion standard. *See First Options,* 514 U.S. at 948, 115 S.Ct. at 1926.

[10]:The Commodity Exchange Act (the "CEA"), 7 U.S.C. §§ 1-25, regulates those who participate in transactions involving commodities futures. Persons who actively participate in that industry, including futures commissions merchants, introducing

brokers, and *associated persons* must register under the CEA. *See* 7 U.S.C. §§ 6f(a) & 6k(1). For a more complete explanation of the regulatory system, including Congress's delegation of the registration function to the CFTC and NFA, *see Pipkin,* 64 F.3d at 259.

[11]:As an associated person Scott was, by definition, required to register as an associate member of the NFA. *See Pipkin,* 64 F.3d at 261 (citing the NFA Member Arbitration Rules).

[12]:In making this argument, Scott repeatedly asserts that he structured the Fund's accounts with PSI with the specific intent to avoid individual liability. Indeed, relying on this logic Scott essentially denies that *he* has any dispute with PSI at all. Scott's arguments about the structure of the accounts and his personal liability, however, have *nothing* to do with the issue at hand: whether Scott's personal status as an associate member of the NFA required him to arbitrate the merits of an alleged dispute with PSI.

[13]:As the *First Options* Court explained, this is precisely the reverse of the presumption that we applied to the question of whether the parties agreed upon *who* should decide the question of arbitrability. *Id.* at 944-45, 115 S.Ct. at 1924-25.

[14]:For this reason, we will not address Scott's contention that the arbitrators' award ignores applicable principles of corporate law or Florida's statute of frauds.

[15]:Section 10 of the FAA provides in pertinent part:

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration-

(1) Where the award was procured by corruption, fraud, or undue means.

(2) Where there was evident partiality or corruption in the arbitrators, or either of them.

(3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made....

9 U.S.C. § 10.

[16]:Scott's briefs on the fraud argument all but admit that the arbitrators had all the material information before them, a fact that precludes vacatur under § 10(a)(1). *See Bonar v. Dean Witter Reynolds, Inc.*, 835 F.2d 1378, 1383 (11th Cir.1988); *accord A.G. Edwards & Sons, Inc. v. McCollough*, 967 F.2d 1401, 1404 (9th Cir.1992) (per curiam) ("where the fraud or undue means is not only discoverable, but discovered and brought to the attention of the arbitrators a disappointed party will not be given a second bite at the apple."). We decline Scott's invitation to overrule *Bonar* and note that, even if we were so inclined (and we are not), the law in this circuit is emphatic that only the entire court sitting *en banc* can overrule a prior panel opinion in the absence of an intervening Supreme Court decision. *See United States v. Woodard*, 938 F.2d 1255, 1258 (11th Cir.1991) (per curiam).

[17]:Scott arrives at this conclusion because each of the arbitrators assigned to hear his case have connections to Futures Commissions Merchants, who, he alleges, are the only entities entitled to collect debit balances from customers under the CEA. Scott also argues that, because persons with such ties to Future Commissions Merchants dominate the NFA, he could not receive a fair hearing. Such an attack on the forum, however, is far too attenuated to satisfy the prerequisites for an attack under § 10(a)(2). *See Woods*

*v. Saturn Distrib. Corp.*, 78 F.3d 424, 427-30 (9th Cir.1996) (rejecting a claim of bias based on the arbitrators' dependence on the makers of Saturn automobiles); *Pompano-Windy City Partners v. Bear, Stearns & Co.*, 698 F.Supp. 504, 517 (S.D.N.Y.1988) (similar ruling in the securities context).

[18]:Scott repeats this tactic throughout his briefs by injecting his disagreement with the arbitrators on the merits of the dispute into his discussions of the arbitrators' jurisdiction and his arguments for vacatur under section 10. We will address Scott's contention that the arbitrators disregarded the law below, but decline his invitation to conflate that dispute with the section 10 analysis.

[19]:Scott also alleges that NFA's Chairman of the Board is the president of a company that has a dispute with the Fund. Without any assertion that this particular individual played any role in his case, however, Scott's allegations remain too vague and attenuated to support a finding of evident partiality under our case law.

[20]:Scott devotes a great deal of his brief to a letter prepared by PSI's counsel that states Scott faced no court imposed barrier to appearing before the arbitrators on October 31, 1995. His arguments and allegations on this matter are without merit.

[21]:We note that, before the *Montes* opinion, an attack based on the arbitrators' manifest disregard of the law was not an option in this circuit-a point not lost on either PSI or the district court. As *Montes* was not delivered until November 24, 1997-more than a month after oral argument in this case-the parties have not briefed the issue. Although we typically do not consider arguments not raised by the parties on appeal, we note that Scott's briefs make clear his charge that the NFA arbitrators (as well as the ALJ and CFTC arbitrators) have ignored the law. We further note, however, that Scott's arguments do not approach the type of disregard for the law that we found in *Montes*. In that case, we found that one of the parties had expressly conceded that the law did not support his position and urged the arbitrators to ignore the law to find in his favor. *See Montes*, 128 F.3d at 1461. That particular fact led us to

distinguish the case from our precedents refusing to vacate an award that the moving party claimed to be the product of legal error, and led us to vacate the award for manifest disregard of the law. *Id.* at 1461-62; *see also id.* at 1464 (Carnes J., concurring). The record in this case and Scott's arguments suggest nothing more than a disagreement over the application of the law not its manifest disregard.

[22]:Scott's arguments that the NFA's excessive filing fees violate his right of access to the courts, guaranteed by Florida's Constitution, are without merit. Even if Scott could somehow convince us that *Florida's* constitutional protections apply to an allegedly *federal* agency's conduct of an arbitration hearing in *Georgia*, his arguments find no support in Florida law. *See Terminix Int'l Co. v. Ponzio*, 693 So.2d 104, 109 (Fla.Dist.Ct.App.1997) ("The short answer to these arguments [invoking Florida's constitutional protections] is that the plaintiffs waived these rights by consenting to arbitrate...."). Scott's equal protection attack on the same NFA fee, in addition to having no merit, was raised for the first time on appeal. *See Irving v. Mazda Motor Corp.*, 136 F.3d 764, 769 (11th Cir.1998) (declining to address an argument not raised in the district court).

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
No. 96-9106

Filed Jul 30, 1998

WILLIAM SUMNER SCOTT,

Plaintiff-Appellant,

versus

PRUDENTIAL SECURITIES, INC.,

Defendant-Appellee.

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On Appeal from the United States District Court for the Northern District of Georgia

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ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING RN BANC

(Scott v Prudential Securities, Inc., 141 F.3d 1007, 11th Cir., 1998,).

Before: BIRCH, Circuit Judge, FAY, Senior Circuit Judge, and COHILL*, Senior District Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/Stanley F. Birch, Jr.
UNITED STATES CIRCUIT JUDGE

* Honorable Maurice Cohill, Jr., Senior U.S. District Judge for the Western District of Pennsylvania, sitting by designation.



APPENDIX B

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

WILLIAM SUMNER SCOTT,

Petitioner,

v.

PRUDENTIAL SECURITIES, INC.,

Respondent.

NO. 1:95-cv-3284A-JEC

FILED IN CHAMBERS
9/4/96
Luther D. Thomas, Clerk
By: /s/ J. Batz
Deputy Clerk

**ORDER**

The above entitled action is presently before the Court on Plaintiff's Motion For Reconsideration [31].

IT IS HEREBY ORDERED that Plaintiff's Motion for Reconsideration [31] is DENIED.

SO ORDERED, this 4 day of SEPTEMBER, 1996.

/s/ Julie E. Carnes
JULIE E. CARNES
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET
SEP 05 1996
L.D.T., Clerk
BY
DEPUTY CLERK

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

| | |
|---|---|
| WILLIAM SUMNER SCOTT, : | FILED IN CHAMBERS |
| : | 7/18/96 |
| Petitioner, : | Luther D. Thomas, Clerk |
| : | By: /s/ J. Batz |
| V. CIVIL NO. 1:95-CV-3284-JEC : | Deputy Clerk |
| : | |
| PRUDENTIAL SECURITIES, INC.,: | CIVIL NO. |
| : | 1:95-CV03284-JEC |
| Respondent. : | |

**ORDER**

This case is presently before the Court on petitioner's Petition to Vacate Arbitration Award [1], petitioner's Motion to Compel Production [20], petitioner's Renewed Motion to Admit Transcript [21], petitioner's Motion for Extension of Time to File Reply to Response to Petition to Vacate Arbitration Award and to File Response to Motion to Confirm Arbitration Award [27], petitioner's Supplement to Renewed Motion to Admit Transcript [28], respondent's Motion to Confirm Arbitration Award [7], respondent's Motion for Attorney's Fees (incurred in conjunction with responding to petitioner's Motion to Compel) [22]. The Court has reviewed the record and the arguments of the parties and, for the reasons set out below, concludes that petitioner's Petition to Vacate Arbitration Award [1] should be denied, petitioner's Motion to Compel Production [20] should be denied, petitioner's Renewed Motion to Admit Transcript [21] should be denied, petitioner's Motion for Extension of Time to File Reply to Response to Petition to Vacate Arbitration Award and to File Response to Motion to Confirm Arbitration Award [27] should be denied, petitioner's Supplement to Renewed Motion to Admit Transcript [28] should be denied, respondent's Motion to confirm Arbitration Award [7] should be granted, and respondent's Motion for Attorney Fees [22] should be denied?

## BACKGROUND

Petitioner Scott is the sole shareholder, president and associated person of Creative Strategies, Inc. (hereinafter "CSI"), a corporate entity created to manage . commodity pools. In April of 1991, petitioner opened account ASH 960342 under the name Creative Strategy Fund I (hereinafter "CSF" or "Fund"), with Prudential Securities, Inc. (hereinafter "PSI"). CSI was the general partner of CSF, and thus, Scott, as the owner all the stock of the CSI, was the sole limited partner" of the CSF account. (*See* Pet. to Vacate Arb. Award [1] at Ex. 2.) At the time the CSF account was opened, petitioner executed all required account opening documents.

Following a depletion of the funds in the account due to unsuccessful trading, petitioner revoked the power of attorney to enter trades for that account, and thereafter, maintained the account as a cash depository with PSI. In November of 1991, in an attempt to revitalize the CSF account, petitioner opened sub-account number ASH 960792 and authorized commodity trading advisor (hereinafter "CTA") R.E. Maseri to execute trades on that account. Still later, CSF sought out the Rowland Brothers Company, another CTA, to trade the CSF account through sub-account ASH 960784. CSF executed supplementary new account documentation for both sub-accounts. (*Id.* at Ex. 4.)

Although the combined accounts were initially successful, a deficit soon existed, fueled primarily by the downwardly spiraling account managed by the Rowland Brothers. Ultimately, PSI issued a margin call against the accounts. The CSF account was liquidated on April 2, 1992, resulting in a debit balance of $101,087.53. In May of 1992, PSI initiated an action with the National Futures Association (hereinafter "NFA") against Scott, CSF, and CSI in an effort to collect the debit balance created by the losses in account ASH 960784.

In October, 1992, CSF filed a complaint with the Commodity Futures Trading Commission (hereinafter "CFTC") claiming damages by reason of wrongdoing on the part of respondent PSI. PSI complied with an order to withdraw the parallel NFA proceeding against CSF and CSI. The arbitration claim against the petitioner, however, was permitted to remain. (*Id.* At 12.) PSI then filed an amended answer, including a counter-claim, seeking to recover the debit balance from CSF, CSI and petitioner, individually, in the CFTC adjudication. The amended answer was accepted as to CSF and CSI, and denied as to petitioner. The NFA panel subsequently granted a stay of the NFA proceeding against petitioner pending the outcome of the CFTC proceeding.

In 1994, an administrative law judge ("ALJ") of the CFTC determined there was "not a scintilla of merit to (the CSF) complaint," and granted PSI an award against CSF and CSI in the total sum of $101,087.53 plus interest to the date the judgment is paid. (*Id.* at Ex. 2.) Subsequently in 1995, the CTFC heard petitioner's appeal of the ALJ's Initial Decision. The Initial Decision was affirmed in all material respects, including the award of $101,087.53 to PSI on its debit balance counterclaim. (Pet. to Vacate Arb. Award [1] at Ex. 1.)

Frustrated by the Eleventh Circuit's dismissal of the ensuing appeal filed by CSF and CSI, those two entities filed a collateral attack upon the CFTC order in a civil action in the state court of Florida. on December 20, 1995, the Circuit Court of the 15th Judicial Circuit in and for Palm Beach County, Florida dismissed the complaint against PSI. CSF and CSI have filed a notice of appeal concerning that decision. PSI has filed an action in the southern district of Florida (95-8423-CIV-GRAHAM), requesting that the district court confirm the CFTC order and reduce it to final judgment.

Meanwhile, PSI had renewed its NFA arbitration proceeding against petitioner individually, following the CFTC's affirmation of the ALJ decision. By an award dated November 20,

1995, a three person arbitration panel from the NFA found that CSF and CSI were the mere alter egos of petitioner, pierced the corporate veil and granted PSI's request that the debit balance be imposed upon petitioner Scott personally. The arbitrators awarded PSI $106,987.54 plus interest. (*Id.* at Ex. 3.) Petitioner Scott then filed a petition in this Court to vacate, modify and correct the arbitration award.

## DISCUSSION

I. Power to Determine the Arbitrability of the Dispute.

Before reaching the substance of petitioner's arguments for vacatur, the Court must first determine which judicial body had the authority to determine whether petitioner was properly before the arbitration panel. Petitioner raised the argument to the NFA panel that there was no agreement to arbitrate the merits of the dispute. specifically, petitioner argued that no arbitration clause exists in any of the documents he signed, that the NFA member-to-member rules--which mandate arbitration--do not apply to him, and that he is not personally a member of the NFA.[1] The arbitrators, in ruling on the merits of the case, implicitly decided that there was a valid agreement to arbitrate the dispute.

In *First Options of Chicago v. Kaplan*, 115 S. Ct. 1920 (1995), the Supreme Court addressed the question of whether arbitrators or courts have the primary power to decide if the parties agreed to arbitrate a dispute. The Court opined: "Just as the arbitrability of the merits of a dispute depends upon whether the

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[1] Persons actively participating in the commodity futures industry are obligated to register under the Commodity Exchange Act (hereinafter "Act") . 7 U.S.C. §§ 6f(a) and 6k(l). CFTC, the congressionally created regulatory regime, possesses the power to register such persons. Under 7 U.S.C. §5 21(j) and (o), the CFTC delegated this registration function to the NFA, a private corporation registered as a futures association under the Act.

parties agreed to arbitrate that dispute, so the question 'who has the primary power to decide arbitrability' turns upon what the parties agreed to about that matter. Kaplan, 115 S. Ct. at 1923 (internal citations omitted).

"[A]rbitration is simply a matter of contract between the parties ..." *Id.* at 1924. Accordingly, the Court must review and examine the documents pertaining to the parties, agreement in this matter. Indeed, "[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]l evidence that they did so." *Id.* (quoting *AT&T Technologies v. Communication Workers*, 475 U.S. 643, 649 (1986)).

In the instant case, the Court finds that petitioner Scott clearly agreed to have all disputes determined by the arbitrators, including a dispute over the question of arbitrability. Petitioner fully acknowledges that he is a CFTC-registered associated person. (*See* Pet. to Vacate Arb. Award [1] at ¶ 11.) Such associated persons are by definition associate members of the NFA. (Resp. Mot. to Confirm Arb. Award [7] at Ex. F.) The NFA Member Arbitration Rules provide: "Under NFA Bylaws every person who is associated with a Member within the meaning of the term 'associated person' ... and who is required to be registered as such with the Commission, must register with the NFA as an associate."[2] (1d. at Ex. G.)

Additionally, the Form S-R application for registration as an associated person under the Commodity Exchange Act and, simultaneously, as an Associate in the NFA, which petitioner signed, states that "execution and delivery of this application shall

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[2] Respondent additionally offers an affidavit of a paralegal who called the NFA registration hotline and confirmed that, except for the period of June 14, 1993 through January 31, 1994, petitioner was continuously registered as a CFTC associated person from 1987 until February 27, 1996, the date of the affidavit. (*See* Affidavit of Marianne Skelly, attached to Resp. Mot. to Confirm Arb. Award [7] at Ex. I.)

constitute ... an express agreement by [applicant) that, if registered as an Associate, (he] shall become and remain bound by all NFA requirements as then and thereafter in effect. " (*Id.* at Ex. J, p. 8 (emphasis added).)

One of those requirements is the NFA's "Member Arbitration Rules, " adopted May 1, 1992.[3] Under section 2 (a) of these Rules, "disputes between and among Members and Associates shall be arbitrated under these Rules upon the filing of a claim by a Member or Associate (*Id.* at Ex. G. ) (emphasis added).

While there are several exceptions, none apply to the question of determining arbitrability.[4] Aside from these few limitations, there is no restriction in the language as to what disputes are to be arbitrated. Faced with a similarly broadly worded arbitration agreement, which encompassed "[a]ny and all controversies," the Second Circuit concluded that the parties intended to arbitrate issues of arbitrability. *PaineWebber, Inc. v. Bybyk*, 81 F.3d 1193, 1200 (2d Cir. 1996) .

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[3] Under Article XVIII(u) of the NFA's Articles of Incorporation and Rule 1-1(q) of the NFA's Compliance Rules, requirements" is defined as "any duty, restriction, procedure or standard imposed by charter, bylaw, rule, regulation, resolution, or similar provision." (*Id.* at Ex. K.)

[4] Those exceptions apply, for example, where:

(1) the parties, by valid and binding agreement, have committed themselves to the resolution of such dispute in a forum other than NFA;

(2) the parties to such dispute are all required by the rules of another self-regulatory organization to submit the controversy to the settlement procedures of that self-regulatory organization; or

(3) all parties to the dispute are members of a contract market which has jurisdiction over the dispute.

(Resp. Mot. to Confirm Arb. Award [7] at Ex. G.)

Thus, the signed Form 8-R application, coupled with the fact that petitioner acknowledged he was the associated person of CSI, clearly indicate that petitioner agreed to have-all disputes-even a dispute over the issue of arbitrability decided by the arbitrators. Petitioner's assertions to the contrary have no basis in fact or law. The arbitrators implicitly decided that they possessed the power to arbitrate the dispute and accordingly reached the mer-its of the claim.

Once it has been determined that the parties agreed to have the issue of arbitrability decided by the arbitrator, "the court should give considerable leeway to the arbitrator, setting aside his or her decision only in certain narrow circumstances." *First Options of Chicago, Inc. v. Kaplan*, 115 S. Ct. 1920, 1923 (1995). The Court finds no basis--and none is provided by petitioner--for disturbing the panel's implicit decision that petitioner agreed to have it determine the issue of arbitrability.

Indeed, the Court concludes that even if it found that petitioner had not agreed to have the arbitrators determine the issue of arbitrability, the result would be the same. The court would likewise find that by registering as an associated person and by agreeing to be bound by the NFA Rules, petitioner consented to having this matter arbitrated.

The Seventh Circuit, faced with very similar facts, reached the same conclusion in *R.J. O'Brien & Assoc. v. Pipkin*, 64 F.3d 257 (7th Cir. 1995).[5] Despite Pipkin's challenge to the NFA's

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[5] Pipkin, the president, sole shareholder, and associated person of an independent brokerage entity, declared bankruptcy in 1990. In 1992, following the adoption of the NFA's Member Arbitration Rules, R.J. O'Brien, a member of the NFA, initiated an arbitration proceeding against Pipkin, an associate member of the NFA, under the NFA Member Arbitration Rules of the NFA. O'Brien asserted that Pipkin *was personally responsible* for money paid to satisfy

jurisdiction to proceed with arbitration, the matter continued and ultimately resulted in an award in favor of O'Brien. Following cross motions to confirm and vacate the award, in which Pipkin reiterated his contention that he had never consented to arbitrate his dispute with O'Brien, the district court confirmed the award, finding that the NFA conducted the arbitration proceeding in an authorized manner and pursuant to its rules. *Id.* at 259. The Seventh Circuit affirmed the decision, concluding that the Form 8-R and Member Arbitration Rules clearly indicated that Pipkin consented to arbitration. *Id.* at 260.[6] Thus, this Court finds that in the case at bar, petitioner was properly before the arbitration panel, as he had, by becoming an associated person under the Commodities Exchange Act and an Associate in the NFA, consented to the panel's authority to determine the merits of the dispute.

## II. Petitioner's Renewed Motion to Admit Transcript and Supplement to Renewed Motion to Admit Transcript.

This Court has previously denied petitioner's request to admit the transcript of the NFA arbitration hearing because no showing of authenticity had been made. Petitioner renews his motion and attempts to cure the defect in his prior submission by tendering an authenticated audio tape of the proceedings. No authentication is provided, however, for the written material that petitioner claims is a transcript of the hearing. Petitioner submitted an affidavit in conjunction with the "transcript. It states: "Following receipt of the Cassette, a transcription was made under my

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complaints against it by customers introduced by Pipkin's brokerage company. *Pipkin*, 64 F.3d at 259.

[6] The Court notes that although Kaplan was decided just prior to Pipkin, the Seventh Circuit did not expressly follow the Supreme Court's precise methodology for determining whether the parties agreed to arbitrate. Pipkin is nonetheless instructive for its analysis of ascertaining whether consent was given to arbitrate the merits of the dispute, particularly because Pipkin was bound to the same rules as petitioner.

supervision and control (the "Transcript") . It is my belief that the Transcript submitted with the Motion ... is accurate and complete.... In my opinion, the Transcript should be accepted as the record of the arbitration hearing in this case." (Affidavit of William Sumner Scott, attached to Pet. Reply to Mot. to Admit Transcript [18] at ¶¶ 6, 8 (emphasis added ).) Such attestations fall short of the requirements for a proper affidavit. *See* FED.R.CIV.P. 56(e) ("[A]ffidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein."). *See* also *Malek v. Martin Marietta Corp.*, 859 F. Supp. 458, 460 (D. Kan. 1994) (citations omitted) ("It is the plaintiff's personal knowledge, and not his beliefs, opinions, rumors or speculation, that are admissible at trial and the proper subject of any affidavit.") As petitioner has not offered the testimony of the individual who actually transcribed the tape, the court finds that he has once again failed to provide proper authentication for the transcript. Moreover, as respondent points out, there is no evidence suggesting that the transcript was made from the authenticated tape. Thus, the transcript is inadmissible.

Nonetheless, the Court concludes that petitioner has supplied sufficient authentication for the admission of the audio tape of the proceedings under FED.R.EVID. 803(6) . (*See* Affidavit of Regina G. Thoele, attached to Pet. Reply to Mot. to Admit Transcript [18] at Ex. A.) Petitioner offers the tape to demonstrate the evident partiality of the arbitrators, a statutory ground for vacatur. This basis for vacatur will be explored further *infra* at 20-23.

The Court denies petitioner's request to supplement his Renewed Motion to Admit Transcript.

## III. Motion to Compel Production.[7]

[7] The Court denies respondent's request for attorney's fees that were incurred as a result of filing its response to petitioner's Motion to Compel.

With regard to petitioner's Motion to Compel Production, the Court finds that petitioner's purpose in presenting such documentation is beyond the scope of this proceeding. (*See* Pet'r Mot. to Compel Production. [20] at 1, 5 ("William Sumner Scott was not a party to the underlying CFTC action. Accordingly the documents requested in items 1-14 of his Request for Production of Documents are directly related to the claim by this Petitioner that the Orders obtained before the CFTC were obtained by fraud by Prudential; *e.g.*, the arbitration award against the petitioner was also obtained by fraud.").)

Petitioner wishes to disclose the "fraud" perpetrated by PSI, not just before the NFA panel, but also before the CFTC panel. A district court's review of an arbitration award is not an invitation to relitigate the merits of an underlying dispute which was not a part of the immediately relevant proceedings. The documents requested by petitioner are simply irrelevant to the disposition of the issues before the court.

Moreover, as respondent correctly notes, petitioner has not complied with the Local Rules pertaining to this type of motion. Specifically, petitioner has failed to submit a brief in support of his motion articulating the legal basis for his request pursuant to LR 220-1(a)(1). Additionally, it appears that petitioner's motion is untimely under LR 225-4(b). Moreover, petitioner has not included "the certification of counsel with regard to the duty to confer as required by FED.R.CIV.P. 37(a)(2)(A)(B)." LR 225-4(a)(1), (N.D.Ga.). For all of the above reasons, petitioner's Motion to Compel is denied.

## IV. Motion for Extensions of Time.

After a review of petitioner's motions for extensions of time, the Court concludes that it is appropriate to deny such motions. In these motions, petitioner presents the Court with a narrative of the conversations between himself and opposing counsel over the last few months. Other than his own averments,

however, nothing petitioner has provided indicates PSI's consent to extend the time for filing replies or responses to the pending motions. As the Court's Order of April 8, 1996 (161 indicates, petitioner was permitted to file his Reply to the Response to the Petition to Vacate the Arbitration Award within ten (10) days of the Court's ruling on petitioner's Motion to Admit Transcript, The Court ruled on that motion on April 12, 1996. (*See* order [17].) Accordingly, petitioner had to file his Reply by April 22, 1996. He did not. Instead, petitioner waited until July 11, 1996 to request a further enlargement of time.

Even worse, with regard to his Motion to File a Response to PSI's Motion to Confirm the Arbitration Award, petitioner did not even obtain an initial extension. He opted to apparently negotiate behind the scenes with opposing counsel and present his side of the story to the Court several months after his Response was due. As the Court is unaware of any current, valid agreement to allow petitioner additional time to file any Reply or Response--or any extenuating circumstances that would warrant review--his motions are denied.

## V. Review of Arbitration Awards.

"Arbitration proceedings are summary in nature to effectuate the national policy of favoring arbitration, and they require 'expeditious and summary hearing, with only restricted inquiry into factual issues.'" *O.R. Sec., Inc. v. Professional Planning Assocs,* 857 F.2d 742, 747-48 (11th Cir. 1988) (quoting *Legion Ins. Co. v. Insurance Gen. Agency, Inc.*, 822 F. 2d 541, 543 (5th Cir. 1987) and *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 22 (1983)). This Court's disposition with respect to petitioner's Motion to Vacate is a summary procedure that is properly decided on the papers submitted by the parties and the party seeking vacatur bears the burden of setting forth sufficient grounds to vacate the award in his moving papers at the outset. *Id.* at 746 n. 3, 748; FED. R. CIV. P. 78. "Accordingly, the Federal Arbitration Act presumes that reviewing courts will confirm

arbitration awards and that the courts' review of the arbitration process will be severely limited."

*Robbins v. Day*, 954 F.2d 679, 682 (11th Cir. 1992), *overruled in part on other grounds, First Options of Chicago, Inc. v. Kaplan*, 115 S. Ct. 1920, 1926 (1995).

Section 10 of the FAA specifies the following grounds for vacating an arbitration award:

> (1) Where the award was procured by corruption, fraud, or undue means.
>
> (2) Where there was evident partiality or corruption in the arbitrators, or either of them.
>
> (3) Where the arbitrators are guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
>
> (4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10 (a). "The statute does not allow courts to 'roam unbridled' in their oversight of arbitration awards, but carefully limits judicial intervention to instances where the arbitration has been tainted in specified ways." *Robbins*, 954 F.2d at 683 (citations omitted). "Accordingly, parties may not seek a second bite at the apple' simply because they desire a different outcome." *Remmey v. PaineWebber, Inc.*, 32 F.3d 143, 146 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 903 (1995).

Petitioner makes a variety of allegations, the majority of which, in addition to having no merit, are confusing and equivocally framed. Half of petitioner's motion is comprised of

complaints about the ALJ and CFTC proceedings, not the arbitration hearing, while the other half contains over forty paragraphs which randomly refer to one or more of the statutory bases for vacating an arbitration award.[8] In response to the petition, respondent filed an answer to the petition to vacate and motion to confirm the arbitration award under § 10 of the FAA.

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[8] In addition to being unduly long, this brief fails to state cogently the which arguments fall within the separate ground f or vacatur. One example, of many, of petitioner's disorganized method of illuminating his contentions comes in paragraph two, which reads:

> Petitioner put the NFA, the arbitration panel, and Prudential on notice prior to the commencement of the arbitration hearing that there was no arbitration clause, that the now current NFA " member to member" arbitration rules do not apply to him or the dispute in question, that the arbitration panel selected has all the elements for "evident partiality" and bias, that the assertion of mandatory arbitration by the NFA combined with the bias of the NFA arbitration rules and regulations favors the futures commission merchant industry and deny due process to the associated persons who must register with the NFA pursuant to the CEAct, the selection of Atlanta, GA as the site of the arbitration hearing was prejudicial to the Petitioner because Prudential has a business presence at the at location while Petitioner has none and Petitioner must travel more than 500 miles to attend the hearing at his expense, the denial of the right to petitioner to attend the arbitration hearing by telephone conference call by the arbitrators demonstrated their bias and was arbitrary and capricious, the refusal to grant a continuance to permit Petitioner to comply with the Order issued on October 27, 1995 to require Petitioner to produce documents at the hearing to be held on October 31, 1995 demonstrated bias and was arbitrary and capricious,

(Pet. to Vacate Arb. Award [1] at 1 2.)

Petitioner contends that the NFA award was procured by fraud because the ALJ and CFTC decisions were obtained through acts of chicanery by PSI.[9] 9 U.S.C. § 10 (a)(1). Petitioner further asserts that the members of the arbitration panel were not impartial, and that the site and date of the hearing were prejudicial. 9 U.S.C. § 10 (a)(2). Petitioner also argues that the arbitrators were guilty of misconduct in refusing to grant a postponement to provide petitioner more time to produce documents in response to a subpoena, and in refusing petitioner's request to participate in the hearing via telephone. 9 U.S.C. § 10(a)(3). Further, petitioner contends that the arbitrators exceeded their power when they pierced the corporate veil without having the two corporate entities joined as parties, without the benefit of the CFTC order having been reduced to a final judgment, and because the Membership Arbitration Rules that bound petitioner to arbitration were officially adopted after the losses in question occurred.[10] 9 U.S.C. § 10(a)(4). Lastly, petitioner includes allegations that his due process rights were violated and that the panel acted arbitrarily and capriciously.

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[9] Petitioner also invokes the Alternative Dispute Resolution Act, § U.S.C. 571 et. seq., as providing additional bases for vacating the arbitration award. As respondent correctly notes, however, regardless of its applicability, the Act has a sunset provision. *See* § U.S.C. § 571, Historical and Statutory Note ("The authority of agencies to use dispute resolution proceedings under the Act ... shall terminate on October 1, 1995, except that such authority shall continue in effect with respect to then pending proceedings which, in the judgment of the agencies that are parties to the dispute resolution proceedings, require such continuation until such proceedings terminate."). Thus, the Court will not entertain petitioner's arguments based on the Act.

[10] As stated *supra* at 7, the fact that the Membership Arbitration Rules were created after the event is of no consequence. The Form 8-R application states that associates shall be -bound by future requirements, like the Membership Arbitration Rules.

Upon complete review of the arguments of the parties, the Court finds that none of the petitioner's arguments provide a basis upon which the arbitration award may be vacated. Accordingly, the Court concludes that respondent's Motion to Confirm should be granted, and that petitioner's Motion to Vacate should be denied.

**A. Petitioner's claim that the Award Was Procured by Fraud.**

Pursuant to the FAA, a reviewing court may vacate an arbitration award if "the award was procured by fraud." 9 U.S.C. § 10 (a) (1) .

> [The moving party] must meet the three requirements set forth in Bonar v. Dean Witter Reynolds, Inc. , 835 F.2d 1378, 1388 (11th Cir. 1988). First, it "must establish fraud by clear and convincing evidence." *Id.* "Second, the fraud must not have been discoverable upon the exercise of due diligence prior to or during the arbitration. " *Id.* Finally, [petitioner] "must demonstrate that the fraud materially related to an issue in arbitration.' *Id.*

*O.R. Sec., Inc. v. Professional Planning Assocs.*, 857 F. 2d 742, 748 (11th Cir. 1988).

To support his claim of fraud, petitioner alleges that PSI procured the ALJ order "by use of fraud against the Fund which was detected, in part, but not corrected by the CFTC." (Pet. To Vacate the Arb. Award [1] at ¶ 122.) The ALJ had found that petitioner executed a full set of account-opening documents for each account he opened with PST. The CFTC amended the initial decision of the ALJ to reflect that CSF executed a full set of account-opening documents f-or the primary account, and only supplementary new account documentation for the remaining two accounts. The CFTC panel wrote, however, that: "Despite this error, [the commission found] that the factual assessments material

to the ALJ's resolution of this matter are sufficiently reliable to warrant [their] deference." (*Id.* at Ex. 1.)

The CFTC order was presented to the arbitration panel, with the record reflecting that the CFTC did not rely on the fact-finding error committed by the ALJ. Moreover, it is clear that the arbitrators were aware of petitioner's contention at the outset of the hearing, thereby nullifying any possibility of petitioner satisfying the second of the aforementioned *Bonar* prerequisites concerning discovery of the fraud. (*See, e.g.*, Pet. to Vacate Arb. Award [1] at ¶ 35 ("The Fund objected to the ALJ and the CFTC that Exhibit 4, R-4[11] was a fraud, prepared out of the ordinary course of business by Prudential after the losses were known and not delivered to the Fund until the day of the hearing before the ALJ.").) As for petitioner's contention that he intends to prove PSI was engaged in a pattern of fraudulent behavior against its customers, the proper forum for resolving that argument was before the ALJ or during the CFTC proceeding, not as part of a motion to vacate an award imposing personal liability, after disposition of that issue has already taken place in a collateral proceeding.[12]

**B. Petitioner's Claim that the NFA Arbitration Panel Was Evidently Partial and Biased.**

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[11] This exhibit contains Account Status Reports from March 27, 1992 to April 2, 1992 for Account #960342.

[12] Petitioner reiterates this intention in his motion to Compel Production. (*See* Mot. to Compel Produc. [20] at § 6 ("It is also the intention of the Petitioner to prove that Prudential has a pattern of fraud against its customers, such as Petitioner. Petitioner has made requests for information to prove that Prudential is engaged in a practice of fraud. In that regard, Petitioner requires items 15-21 of his Request for Production of Documents.").) Again, the district court is not the appropriate forum for attacking the practices of respondent. As stated *supra* at 13, the Court finds that petitioner's Motion to Compel Production should be denied.

Section 10 of the FAA further provides that a reviewing court may vacate an arbitration award "where there was evidence of evident partiality or corruption in the arbitrators. 9 U.S.C. § 10 (a) (2). No one jurist has yet coined an exact legal standard for "evident partiality", although many have tried. Generally, though, a reasonable appearance of bias warrants vacating an arbitration award. *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 14 5 (1968) . *See* also *Lifecare Intem., Inc. v. CD Medical, Inc.*, 68 F. 3d 429 (11th Cir. 1995) (requiring party challenging arbitration award to establish that undisclosed facts create reasonable impression of partiality.) As the question of whether an arbitration panel has shown "evident partiality" depends upon the unique factual circumstances of each arbitration proceeding, courts must perform a fact intensive inquiry on a case by case basis.

Petitioner broadly asserts the following two reasons for vacating the award on the ground of evident partiality: (1) the arbitrators are "in the same business" as the respondent; and (2) the site and date chosen for the hearing further demonstrate the arbitrators' evident partiality. After listening to the tape recording of the proceedings, the Court can find no evidence of such partiality, however. Indeed, the Court concludes that petitioner has failed to point to any part of the record that would indicate a trace of, much less evident, partiality.

Petitioner's narration of the individual panel members resumes, rather than demonstrating partiality, demonstrates the arbitrators' knowledge and familiarity with the complexities of the futures industry. Indeed, Rule 3(a) requires arbitration proceedings to be conducted before panels consisting of three (3) NFA members. The Rules also mandate that arbitrators fully disclose any circumstances that might prevent them from acting impartially, that the party opposing an appointment have the opportunity to voice concerns, and that the arbitrators sign an oath promising to faithfully and fully carry out their duties.

Petitioner does not allege any failure on any panelist's part to disclose information pertinent to the issue of partiality, or any incidents which could create a reasonable impression of partiality. Moreover, even if the court were to accept petitioner's assertion that the arbitrators are 'in the same business" as PSI, the relationship described is far too remote to raise the partiality issue. In sum, the Court finds that petitioner has completely failed to demonstrate any evident partiality in the individual arbitrators who sat on the case, by virtue of their backgrounds.

Petitioner also contends that the decision to hold the hearing in Atlanta demonstrates the panel's partiality. Such a contention, without more, however, fails to demonstrate bias. Additionally, Member Arbitration Rule 9(b) provides that the selection of the place and time of the hearing shall be determined in the sole discretion of NFA's Secretary, not the arbitration panel, "who shall endeavor to accommodate, if possible, the preferences of all parties and members of the panel." (Pet. to Vacate Arb. Award [1] at Ex. G.) Further, petitioner has failed to produce any evidence to support his contention that Atlanta was chosen because it was such an inconvenient forum for him and that the Secretary's decision to require his attendance there demonstrated the panel's evident partiality for PSI. Instead, petitioner simply asserts that PSI does business there while he did not. Without more, petitioner's request to vacate the arbitration award on the basis of evident partiality as stated in 9 U.S.C. § 10(a) (2) must be denied.

### C. Petitioner's Claim that the NFA Arbitration Panel Was Guilty of Misconduct.

Pursuant to the FAA, a reviewing court may also vacate an arbitration award if "the arbitrators were guilty of misconduct in refusing to postpone the hearing, or of any other misbehavior by which the rights of any party may have been prejudiced." 9 U.S.C. § 10(a)(3) This statutory basis does not, however, invite hindsight evaluations of the correctness of a judgment of an arbitration panel with respect to the scheduling of hearings and the presentation of evidence. Indeed, "[a]n arbitrator enjoys wide latitude in

conducting an arbitration hearing." *Robbins v. Day*, 954 F.2d 679, 685 (11th Cir. 1992).

As the Court reads §10(a)(3) of the FAA, there are three general subcategories of arbitration panel misconduct that would justify vacatur: (1) misconduct in refusing to postpone a hearing; (2) misconduct in refusing to hear material evidence; or (3) any other "misbehavior" that prejudices any party's rights. Although it is not entirely clear from his motion, petitioner appears to argue that both the first and third bases for vacatur under § 10(a)(3) exist in this case. The Court emphasizes, however, that it is arbitrator misconduct or misbehavior that warrants vacatur, not a difference of opinion with respect to the ideal resolution of procedural issues that arose during the course of the arbitration.

Petitioner makes two arguments: (1) that the panel was guilty of misconduct for refusing to grant a continuance to allow petitioner to comply with the subpoena requiring production of documents; and (2) that the panel was guilty of misconduct in refusing to allow him to participate in the hearing by telephone. (*See* Pet. to Vacate Arb. Award [1] at ¶¶ 93, 104.)

Upon review of the record and the arguments of the parties, the Court can discern no arbitrator misconduct that would warrant vacatur. With respect to the panel's refusal to grant a postponement, "Ct]he issue comes down to the question whether there was any reasonable basis for the arbitrators to refuse to postpone the hearing or to continue it in order to receive (additional] testimony." *Schmidt v. Fineberg*, 942 F-2d 1571, 1574 (11th Cir. 1991). *See* also *Ceco Concrete Constr. v. J.T. Schrimsher Constr.*, 792 F. Supp 109, 110 (N.D.Ga. 1992) (Moye, J.) (noting that denial of postponement falls within broad discretion of appointed arbitrators).

On October 27, 1995, the panel ordered petitioner to produce checkbooks and cancelled checks of CSF and CSI, articles of incorporation, corporate minute books, shareholder ledgers and bylaws, partnership agreements, tax returns, and commercial and equipment lease agreements for the two entities. (Pet. to Vacate

Arb. Award [1] at Ex. 6.) Petitioner was to have these documents at the hearing set for October 31, 1995. He apparently filed a request for a continuance for more time to produce the records which was denied by the panel.

Petitioner argues that the decision was inappropriate because the length of time given to comply with the subpoena duces tecum was too short to permit complete compliance. Respondent directs the Court's attention to the fact that PSI had pressed for production of these documents for more a year, over petitioner's continuous objections.[13] (*See* Pet. to Vacate Arb. Award [1] at ¶ 50.) Thus, petitioner was keenly aware of the possibility that he might have to turn over the sought after documents at some point. This prior knowledge--and failure to prepare in light of that knowledge--form a reason-able basis for the arbitrators' decision to deny a continuance of the hearing.[14] Moreover, it appears that it was in petitioner's interest to produce such documents for the panel's review. The issue before the panel was whether CSI and CFI were the mere alter egos of petitioner. Petitioner argued that he should not be held personally liable because PSI assured him that it would not seek personal liability against him.

Petitioner's financial records would certainly give a good indication of whether the entities were indeed separate from him and could have helped petitioner's position. Thus, his failure to have such documents ready was the product of his own lack of preparation. Moreover, petitioner fails to demonstrate how the documents he would have been able to produce, had a continuance

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[13] Petitioner apparently argued that the documents were not relevant. Where the issue was whether CS1 and CFS were mere alter egos of petitioner, the assertion that the financial records of the corporations were irrelevant cannot be seriously entertained.

[14] Although it is not entirely clear from the record whether petitioner sought an extension of time for the production of the documents or an actual continuance of the hearing, the effect of his request was the same.

been granted, would have affected the outcome. He gives no indication that such documents would have been in any way influential or exculpatory. Accordingly, for the above reasons, the Court finds no evidence of misconduct on the part of the panel resulting from the denial of petitioner's request to delay the hearing.

In addition, petitioner filed a motion for permission to testify over the telephone due to an alleged inability to attend the hearing personally. Petitioner offers no evidence in support of his assertion that he was prevented from appearing personally. He merely asserts that he was financially unable to afford the trip from Florida to Atlanta. Also, petitioner mentions that he was preoccupied with the Florida litigation, but there is no evidence of either a court appearance or deadline scheduled near the date of the hearing, October 31, 1995, which might have impeded petitioner's ability to prepare for, or appear at, the hearing. (*See id.* At Ex. R.)

After receiving the panel's denial of these requests, petitioner simply failed to appear at the hearing. In his stead, petitioner sent via overnight courier a fifty-six (56) page affidavit and accompanying exhibits. Notwithstanding the panel's desire that petitioner appear and testify personally, it appears that it generously accepted these documents into evidence.

In sum, the Court finds that petitioner has failed to demonstrate that the arbitrators were guilty of misconduct for refusing his request for a continuance and his request to appear telephonically. Petitioner knew that he might have to turn over certain documents and should have so prepared himself. Moreover, he cannot explain to this Court in a satisfactory manner why he was prevented from attending the hearing and presenting his evidence in person. Presumably, his arguments to the panel were equally unpersuasive. Petitioner has similarly been unable to demonstrate that the setting of the date and location of the hearing worked any

prejudice upon him;[15] nor has he shown that his absence worked to his disadvantage. For example, petitioner does not identify what additional evidence he would have presented had he appeared telephonically, or otherwise indicate how the proceedings would have been changed.

The Court further reminds petitioner that arbitrators have wide latitude in conducting arbitration hearings and are not required to hear any and all evidence tendered by the parties. *Robbins v. Day*, 954 F-2d 679, 685 (11th Cir. 1992) "Thus, the (FAA] allows arbitration to proceed with only a summary hearing and with restricted inquiry into factual issues." *Id.* Accordingly, the Court concludes that petitioner's Motion to Vacate should be denied to the extent petitioner relies upon § 10(a)(3) of the FAA.

**D. Petitioner's Claim that the NFA Arbitration Panel Exceeded its Powers.**

Petitioner asserts that the arbitration panel exceeded its power in piercing the corporate veil when neither CSF nor CSI was named in the arbitration, the CFTC decision had not been reduced to judgment, and the NFA Member Arbitration Rules had been adopted after the losses for which petitioner is being held responsible were incurred. "In light of the federal policy favoring arbitration at work here, (the Court's) task is to resolve all doubt in favor of the arbitrator's authority to award a particular remedy." *Willoughby Roofing & Supply Co. v. Kajima Int'l, Inc.*, 776 F. 2d 269, 270 (11th Cir. 1985) (citing *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983) and *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960)).

This approach is fully consistent with the presumption of correctness afforded arbitration awards and the summary nature of

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[15] Indeed, by entering into the arbitration agreement, petitioner consented to the forum selection clause authorizing the NFA Secretary to select the situs of the hearing.

court confirmation of such awards. In fact, the S 10 (a) (4) prohibition against arbitrators' exceeding their powers "is to be accorded the 'narrowest of readings.'" *Blue Tee Corp. v. Koehring Co.*, 999 F.2d 633, 636 (2d Cir. 1993) (quoting *Andros Campania Maritima, S.A. v. Marc Rich & Co. A.G.*, 579 F.2d 691, 703 (2d Cir. 1978). Moreover, the party challenging the award "bears the burden of proof that the ... arbitrators exceeded their authority.," *Id.* (citation omitted).

Petitioner has failed to provide any applicable or germane legal citation for his contentions concerning the arbitration panel's piercing of the corporate veil.[16] Respondent, mean-while, refers the court's attention to Pipkin, where the Seventh Circuit affirmed the district court's confirmation of an award against the associated person, individually, to indemnify the futures commission merchant for losses it had suffered. There is also authority for the proposition that a parent will be bound to arbitrate where its alter-ego instrumentality signed the actual arbitration agreement. *Fisser v. International Bank*, 282 F.2d 231, 234 (2d Cir. 1960). *See* also *Doctor's Associates v. Distajo*, 66 F.3d 438, 453-54 (2d Cir. 1995) ("As we have explained in the context of contractual liability, 'it is clear that the consequence of applying the alter ego doctrine is that the corporation and those who have controlled it without regard to its separate entity are treated as but one entity, and ... the acts of one are the acts of all.'")

Further, as the Court has already determined, petitioner was bound to all the NFA Rules "then and thereafter in effect", including, specifically, the Membership Arbitration Rules. Having

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[16] Petitioner relies upon *Keystone Shipping Co. v. Texport Oil Co.*, 782 F. Supp 28 (S.D.N.Y. 1992), to argue that there was "no justification to pierce the corporate veil." That case simply delineated the circumstances under which arbitration clauses may be applied to non-signatories. Notably, one situation involves piercing the corporate veil of a signatory to reach a non-signatory. *Id.* at 30-32. Thus, rather than support petitioner's position, *Keystone* cuts against it.

been provided with no legal justification for petitioner's contentions that the arbitration panel exceeded its powers, let alone substantial enough proof to carry his burden, the Court, therefore, concludes that the award should not be vacated under 5 10(a)(4) of the FAA.

### E. Non-statutory Grounds for Vacatur.

In addition to the four statutory grounds for vacatur, the Eleventh Circuit has recognized two additional non-statutory bases upon which an arbitration award may be vacated.[17] First, an arbitration award may be vacated on the ground that it is "arbitrary and capricious", though that basis has been rather narrowly construed. *Robbins v. Day*, 954 F.2d 679, 683 (11th cir. 1992); *Raiford v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 903 F. 2d 1410, 1411-12 (11th Cir. 1990) . Second, an arbitration award may be vacated if its enforcement would be contrary to public policy. *Brown v. Rauscher Pierce Refsnes, Inc.*, 994 F.2d 775, 778 (11th Cir. 1993) (citing Delta Air Lines, Inc, v. Airline Pilots Ass'n, 861 F. 2d 665, 671 (11th Cir. 1988), cert. denied, 493 U.S. 871 (1989)).[18]

In explaining when an award is "arbitrary and capricious", the Eleventh Circuit has stated that an award is such "only if 'a

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[17] A third non-statutory ground for vacatur -- manifest disregard of law -- has been recognized in some circuits, though not in the Eleventh Circuit. Raiford v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 903 F.2d 1410, 1412 (11th Cir. 1990); Brown, 994 F.2d at 779, n.3.

[18] Although petitioner makes an ambiguous assertion that the NFA award was entered in violation of public policy, petitioner has failed to present any cogent argument regarding this basis for vacatur, let alone evidence supporting such an argument. Accordingly, this Court cannot properly evaluate such an argument and will limit its analysis to petitioner's contentions that the award should be vacated on the grounds that it is "arbitrary and capricious."

ground for the arbitrator's decision can[not] be inferred from the facts of the case." *Raiford*, 903 F.2d at 1413 (citations omitted). Such a limited definition is consistent with the presumption of correctness afforded arbitral awards. "Only after it is determined that there could be no proper basis for the award, should a court consider looking beyond the [FAA] to determine the applicability of court made standards for the vacatur of an arbitration award." *Robbins*, 954 F.2d at 684.

The record as presented forms a more than satisfactory basis for the award and accordingly the discussion should end here. The Court only mentions the non-statutory bases for vacatur in response to petitioner's frequent invocation of the phrase "arbitrary and capricious" throughout the body of his petition. Although petitioner regularly employs the expression "arbitrary and capricious" to describe the arbitration panel's denial of his request to participate in the hearing via telephone, and its refusal to grant a continuance, he has utterly failed to develop any legal argument in favor of vacating the arbitration award on this ground. The Court has not been directed to any substantive factual evidence beyond petitioner's assertions that would support vacatur. Further, the Court addressed both plaintiff's contentions under the statutory grounds for vacatur, as, there, plaintiff makes slightly more credible arguments.

## VI. Denial of Due Process.[19]

Petitioner also argues that: "It was a violation of due process to bring the arbitration in a location where Prudential does business and where the Petitioner would have to travel over 400 miles to attend. It was also a denial of due process and arbitrary and capricious of the arbitrators to refuse to permit the Petitioner to participate in the arbitration hearing by telephone." (Pet. to Vacate Arb. Award [1] at 30, 1 87.) He further states: "Petitioner was

[19] Petitioner also asserts an argument of frustration of commercial purpose. There is simply no recognition of this argument as a ground to upset an arbitration award.

denied his right to a trial by jury, the opportunity to be heard, the opportunity to have evidence presented against him by witnesses under his right to cross examine those witnesses, and his property has been taken by compelled arbitration, without his specific agreement to arbitrate, and his other due process rights protected by the Constitution of the United States and the State of Florida have been violated."[20] (*Id.* at 32, ¶ 90.)

Essentially petitioner's arguments may be divided into two categories: (1) allegations that his due process rights were violated because the NFA picked an inconvenient location for the hearing, and (2) allegations that his due process rights were violated because he was forced into arbitration by the NFA. After a review of petitioner's claims, the Court concludes that his procedural due process rights were not violated.

In order to proceed with a claim of a procedural due process violation, petitioner must establish: "(1) a constitutionally protected interest in life, liberty, or property, (2) governmental deprivation of that interest; and (3) the constitutional inadequacy of procedures accompanying the deprivation." *Bank of Jackson Cty. v. Cherry*, 980 F.2d 1362 , 1366 (11th Cir.), *cert. denied*, 114 S. Ct. 73 (1993).

Assuming for the moment that the NFA is a governmental actor,[21] petitioner can assert a violation of his procedural due

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[20] Petitioner does not specify whether he was allegedly deprived of his substantive due process rights or his procedural due process rights. Rather than make all of petitioner's arguments for him, the Court finds that he has sufficiently alleged only a violation of procedural due process at most.

[21] First, the Court notes that petitioner's due process claim must be based on the Fifth Amendment rather than the Fourteenth Amendment. Although most cases address actions by state actors, as opposed to federal actors, it appears that the Eleventh Circuit has determined that "in this area the reaches of the Fourteenth and Fifth

process rights only if he first demonstrates he has a property interest in the property of which the government deprived him. In this case, that question is problematic as petitioner has not made clear to the Court just what "property" has allegedly been taken. The only potentially viable argument would be that he has a property interest in his money which the government, through the NFA, deprived him of by ruling against him. Even assuming further that petitioner was able to demonstrate the existence of a protectable property interest and that the government deprived him of it, the Court finds that petitioner received adequate process before the deprivation.

Although the Due Process Clause is flexible and its mandates vary with the particular situation, the Supreme Court has usually held that the Constitution requires some kind of hearing before the government deprives a person of property. *Zinermon v. Burch*, 494 U.S. 113, 127 (1990) . That "pre-deprivation" hearing, however, is not a mini trial and need not definitely resolve the propriety of the decision that results in the deprivation. Instead, it should be an initial check against mistaken decisions. *McKinney v. Pate* 20 F.3d at 1561 (citing *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. at 546).

Accordingly, to receive an adequate pre-deprivation hearing, the person whose property is to be taken must receive notice, an opportunity to respond, and an opportunity to present

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Amendments are coextensive." *Rodriguez-Mora v. Baker*, 792 F.2d 1524, 1526 (11th Cir. 1986). In that case, the Eleventh Circuit held specifically that "*Parratt v. Taylor*[, 451 U.S. 527 (1981),] and its progeny apply with full force to cases brought under the Fifth Amendment due process clause." *Id.* at 1527. Accordingly, the Court will undertake the task of applying this analysis to petitioner's rather poorly articulated claim, referring to cases decided with regard to the Fourteenth Amendment, as they are in more plentiful supply.

reasons, in person or in writing, why the proposed action should not be taken. *Id.* at 1495.[22]

With regard to the first set of allegations, it appears that petitioner was indeed entitled to appear at the arbitration hearing. He was notified of the pending arbitration hearing on September 26, 1995. The hearing was to occur over a month later on October 31, 1995. He was told to prepare witnesses and other evidence. (*See* Resp. Mot. to Confirm Arb. Award [7] at Ex. N.) Petitioner asked for a continuance and for permission to appear by telephone. Those requests were denied. Accordingly, the hearing proceeded without him, although petitioner did submit documents and an affidavit for the panel's review. Petitioner has not persuaded the Court that the panelists engaged in misconduct by refusing his requests. Petitioner received notice; he had the opportunity to be heard. No other process was constitutionally mandated under these circumstances.[23]

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[22] Moreover, although the Court has found no evident partiality on the arbitration panel, it bears noting that even where the hearing was flawed because the hearing officer was biased or otherwise acted in a manner inconsistent with the requirements of procedural due process, procedural due process violations do not become complete "unless and until the (government] refuses to provide due process." McKinney, 20 F.3d at 1562 (quoting *Zinermon*, 494 U.S. at 123.)

[23] The Court notes the awkwardness of even applying a due process analysis to the case at bar. This is not a situation where a welfare recipient's benefits are being terminated by the government without a prior hearing, or where a government employee has been fired without a prior hearing. This case involves an arbitration--a quasi-judicial proceeding where adversaries have disputes settled. The Court is curious as to whether petitioner would attempt to launch the same due process attack against a court if it set a trial date, provided ample notice and instruction, and simply required his personal appearance. Among other things, petitioner would presumably argue that he is entitled to "phone in" his testimony.

Petitioner is apparently under the impression that the NFA must accommodate any desire he has with regard to the locus of the hearing or the manner by which he present his evidence, else violate petitioner's due process rights. Petitioner directs the Court to no case that so holds. The venue chosen, while perhaps less inconvenient than petitioner's hometown, was certainly not unreasonable. No undue burden was placed on petitioner to appear in Atlanta. The Court finds that sufficient process was accorded petitioner, assuming that any was due.

With regard to petitioner's second round of contentions, the Court similarly concludes that petitioner has not established a violation of due process. It appears that petitioner is arguing that the mandated arbitration violated his right to a jury trial. As discussed *supra* at 5-8, the Court finds that petitioner consented to arbitrate this dispute. Thus, he knowingly and voluntarily waived his right to a jury trial.

Similarly, in Pipkin, the respondent asserted that his due process rights were violated. because his consent to arbitrate was unconstitutionally obtained. *Pipkin*, 64 F.3d 257, 262 (1995).[24] The Court held that the NFA did not violate Pip-kin's due process rights by conditioning registration upon the consent to be. bound by its requirements. *Id.*

Petitioner further complains that his right to cross-examine witnesses was denied. Such a contention is meritless, as he had the opportunity to appear and would have had the opportunity to present his evidence and cross-examine witnesses at the hearing. His own failure to appear prevented him from taking advantage of those opportunities. Accordingly, as there was sufficient process

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[24] The Seventh Circuit concluded that the NFA is a government actor because in conjunction with its delegated power to register by the CFTC, it has imposed its own rules on those wishing to register. *Pipkin*, 64 F.3d at 262.

prior to any purported deprivation, petitioner's arguments based on a violation of the due process clause have no merit.

## CONCLUSION

For the foregoing reasons petitioner's Petition to Vacate Arbitration Award [1] is DENIED, petitioner's Motion to compel Production [20] is DENIED, petitioner's Renewed Motion to Admit Transcript [21] is DENIED,[25] petitioner's Motion for Extension of Time to File Reply to Response to Petition to Vacate Arbitration Award and to File Response to Motion to Confirm Arbitration Award [27] is DENIED, petitioner's Supplement to Renewed Motion to Admit Transcript [28] is DENIED, respondent's Motion to Confirm Arbitration Award [7] is GRANTED, and respondent's Motion for Attorney's Fees [22] is DENIED.

SO ORDERED, this 18 day of July, 1996.

/s/ Julie E. Carnes
JULIE E. CARNES
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET
JUL 19 1996
L.D.T., Clerk
BY
DEPUTY CLERK

[25] The Court will admit the authenticated tape in lieu of the transcript Offered.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

WILLIAM SUMNER SCOTT,
Petitioner,

v.

PRUDENTIAL SECURITIES, INC.,
Respondent.

FILED IN CHAMBERS
4/8/96
Luther D. Thomas, Clerk
By: /s/ J. Batz
Deputy Clerk

~~Civil Action~~
File No. 1:95-CV-3284-JEC

CONSENT ORDER EXTENDING TIME

NOW, on this 8th day of April, 1996, pursuant to agreement of counsel, it is hereby Ordered that the time within which Petitioner, William Sumner Scott, may file and serve his Reply to Respondent, Prudential Securities, Inc., Response to the Petition is extended through and including ten days following the ruling by this Court upon the pending Motion of Petitioner to admit the transcript of the National Futures Association arbitration proceedings at NFA Number 92-ARB-107 to the record of this case.

/s/ Julie E. Carnes
Julie E. Carnes, Judge

CONSENTED TO BY:

/s/ William Sumner Scott
William Sumner Scott
Pro se, Petitioner

2730 SW 3rd Ave., Ste. 511
Miami, FL 33129

(305) 285-4114

/s/ Thomas R. Todd, Jr. by WSS by Express Consent
Thomas R. Todd, Jr.
Georgia Bar No.: 713900

Of Counsel:
KUTAK ROCK
Suite 2100, 225 Peachtree St, NE
Atlanta, GA 30303-1768
(404) 222-4600
Attorneys for Respondent

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

| | | |
|---|---|---|
| WILLIAM SUMNER SCOTT, | : | FILED IN CHAMBERS |
| | : | 4/12/96 |
| Petitioner, | : | Luther D. Thomas, Clerk |
| | : | By: /s/ J. Batz |
| v. | : | Deputy Clerk |
| | : | |
| PRUDENTIAL SECURITIES, INC., | : | CIVIL NO. |
| | : | 1:95-CV-3284-JEC |
| Respondent. | : | |

**ORDER**

This case is presently before the Court on plaintiff's Motion To Admit Transcript [11]. The Court has reviewed the record and the arguments of the parties and, for the reasons set out below, concludes that plaintiff's Motion to Admit Transcript be DENIED.

Plaintiff provides no authentication of transcript. Moreover, because plaintiff alleges that the arbitrators did not hear certain evidence or arguments and because plaintiff offers this transcript to prove that fact, it is important that the transcript reflect the entire proceedings. Defendant alleges that there is a gap of undetermined duration in the tape and, accordingly, in the transcript.

Because there is no authentication of the transcript, this Court DENIES plaintiffs Motion To Admit Transcript [11].

SO ORDERED, this 12 day of April, 1996.

/s/ Julie E. Carnes
JULIE E. CARNES
UNITED STATES DISTRICT JUDGE

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NATIONAL FUTURES ASSOCIATION

RECEIVED

Arbitration Office

In the Matter of the Arbitration Between

Prudential Securities, Inc.,
Claimant,

v.

William Sumner Scott,
Respondent.

Re: 92-ARB-107

AWARD

The following issues were presented to and decided by the Arbitrators: See Attachment

We, being selected to hear and determine this matter in accordance with the Member Arbitration Rules of National Futures Association, hereby determine that the following relief shall be granted:

William Sumner Scott shall pay to Prudential Securities, Inc.

| | |
|---|---|
| Compensatory Damages | $ 101,087.54 |
| Punitive Damages | $ 0.00 |
| Treble Damages | $ 0.00 |
| Interest | 3.5% (see below) |
| Attorneys' Fees | $ 0.00 |
| Other Costs | $ 5,075.00 |

William Sumner Scott is liable for the entire Award amount of $106,162.54, plus interest. Interest is to be calculated per annum on $101,087.54 from, April 1, 1993 until the date the Award has been paid.

Total Amount of Award $106.162.54 + interest

/s/ Peter J. Anderson Dated: 11/16/95
Peter J. Anderson, Chairman

/s/ David C. Prince
David C. Prince Date of Service: November 20, 1995

/s/ Grahame Wood
Grahame Wood

Attachment

Claims and Defenses of Prudential Securities, Inc.

This arbitration concerns Prudential Securities, Inc.'s ("PSI") Third Claim for Relief, as set-forth in its First Amended Statement of Claim, wherein PSI alleges that Respondent William Sumner Scott is personally liable for the sums due to PSI ($101,087.54) arising from the deficits incurred in the account of his partnership trading vehicle, Creative Strategy Fund I ("CSFI") .

Claims and Defenses of William Sumner Scott

1. Respondent, Scott, is not a member of the NFA by virtue of his registration as a principal of the corporate General Partner of the Fund or, in the alternative, should Scott be found a Member of the NFA, that membership is not related to the claim of Prudential against the Fund.

2. The NFA, through the pronouncements of Regina G. Thoele, Supervisor, and others is being used by Kathryn Page Camp, Esquire, Associate General Counsel, of the NFA to further her personal interests in becoming a nationally recognized expert in the field of securities arbitration. Ms. Camp, at the expense of small members and individuals who are not able to adequately defend themselves, establishes burdensome obstacles for those small Members and individuals to overcome, so that she may have the opportunity to write Amicus Curiae Briefs on behalf of the NFA in favor of the futures commission merchant industry for her personal gain. See the case of R.J 0'Brien & Assoc. ,.Inc. v. Pipkin, 64 F 3rd 257 (7th Cir. 1995) and the procedural history of this case.

3. Prudential was provided notice of the structure of the Fund, the sole ownership of the corporate General Partner and the sole limited partner of the Fund was Scott in the new account documentation for the Fund before grant of a power

of attorney to the independent CTA, Robert Rowland and Rowland Brothers, to trade account ASH 960784, and accepted the account on the condition' Scott would never be asserted by Prudential to have personal liability upon the account. Prudential is now estopped to assert personal liability upon Scott for the losses claimed in the Partnership account as a result of the trading pursuant to the power of attorney.

4. Scott played no active role in the selection of the trades or the creation of the loss.

5. The Fund is a valid limited partnership formed under the laws of Pennsylvania. See the limited partnership agreement submitted by Prudential attached to the original claim. And the form of the limited partnership agreement was submitted to Prudential prior to the acceptance of any account for trading by Prudential.

6. The corporate General Partner is a valid corporation existing under the laws of Delaware. The corporate documents were submitted to Prudential prior to the opening of any account for trading by Prudential.

7. Scott had inadequate notice of the hearing in this matter to prepare.

8. Prudential moved for the resumption of this hearing before the CFTC Order is final or, in the alternative, this claim by Prudential can not be made against the General Partner of the Fund until the CFTC Order is reduced to judgement.

9. The trades, which caused the loss, were placed by the independent CTA, Rowland, directly with Prudential and, therefore, Prudential was in a better position to prevent the loss than was the Fund, its General Partner, or its principal.

10. Prudential is estopped to claim a loss from the Fund because of its negligence in the computation of margins and

failure to make a prompt margin call in accordance with the terms of the power of attorney.

11. Without the General Partner as a party to this arbitration, the panel is without the power or authority to "pierce the corporate veil" to assert liability against Scott.

12. The Fund has never been a member of the NFA and was the only party to have an account with Prudential; accordingly, the NFA has no jurisdiction to conduct this arbitration.

13. Prudential requested the hearing be set in this matter for October 31, 1995, in bad faith to divert the energy of the Fund from the pending legal actions before the United States District Court for the Southern District of Florida at case number 958423-CIV-GRAHAM and before the Circuit Court of Palm Beach County, Florida, at case number CL 95 2232 AE.

14. It is unethical for two members of the futures commission merchant industry and a lawyer who serves the futures commission merchant industry to attempt to serve upon a three member arbitration panel to resolve a matter which involves assertion that a commodity pool, its commodity pool operator, and its principal owe money to a futures commission merchant.

15. It is a violation of the NFA rules for a person who obtains less than 20% of work effort, measured by his income or time during the past two years, to serve as the chairman of this arbitration panel or, in the alternative, it is a violation of the legal canons of ethics for an attorney who obtained more than 20% of his income or time in the defense of claims against futures commission merchants during the past two years to sit as chairman of an arbitration claim by a major futures commission merchant with contacts within the community served by the attorney against a small commodity pool operator and its principal with no contacts within the community served by the attorney.

16. It is beyond the power of NFA arbitration to "pierce the corporate veil" of a party which did not have an account with the futures commission merchant which makes the claim.

17. The Fund never signed an arbitration agreement for account ASH 960784 where the losses occurred and Prudential never returned a fully executed arbitration agreement for account ASH 960342; accordingly, the Fund, its General Partner, and its principal have never agreed to submit the claim made by Prudential to arbitration.

(2)

Supreme Court, U.S.
FILED
NOV 25 1998
CLERK

No. 98-680

In The

# Supreme Court of the United States

October Term, 1998

WILLIAM SUMNER SCOTT,

*Petitioner,*

*vs.*

PRUDENTIAL SECURITIES, INC.,

*Respondent.*

*On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit*

## RESPONDENT'S BRIEF IN OPPOSITION

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20 pp

## QUESTIONS PRESENTED

I. Whether Petitioner, William Sumner Scott, was required to arbitrate his dispute with Respondent, Prudential Securities Incorporated, pursuant to the member to member arbitration rules enacted by the National Futures Association.

II. Whether the United States Court of Appeals for the Eleventh Circuit was correct in affirming the lower court's confirmation of the arbitration award against Petitioner and in favor of Respondent.

## CERTIFICATE OF INTERESTED PARTIES

The parties in interest are listed in the caption. Prudential Securities Incorporated is a subsidiary of Prudential Securities Group Inc. Prudential Securities Group Inc. is a subsidiary of Prudential Capital and Investment Services, Inc. Prudential Capital and Investment Services, Inc. is a subsidiary of PRUCO, Inc. PRUCO, Inc. is a subsidiary of The Prudential Insurance Company of America. Prudential Securities Incorporated shares ownership in Lapine Holding Company.

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Although Petitioner has set forth eighteen Questions Presented and five Reasons for Granting the Writ, the Petitioner's argument can be reduced to two claims. First, he claims that he should not have been required to arbitrate his dispute with Respondent under the rules of the National Futures Association ("NFA") as an Associated Person (as that term is defined under the NFA rules). Second, he claims that the arbitration proceeding which resulted in a judgment against him should have been vacated on various statutory and non-statutory grounds.

Essentially, Petitioner is asking this Court to review the acts of the lower courts and reverse what he perceives are errors of law and erroneous factual determinations, in plain contravention of the guidelines for the granting of certiorari set forth in Rule 10 of the Supreme Court Rules. The United States Court of Appeals for the Eleventh Circuit (the "Eleventh Circuit") affirmed the lower court's confirmation of the arbitration award based on established precedent in the Eleventh Circuit and after careful review of the lower court's detailed findings of fact. The Petition clearly demonstrates that there is no conflict between the circuit courts of appeals on any issues and presents at most a consideration of the fact-bound application of established precedent.

## STATEMENT OF THE CASE[1]

### A. Course of Proceedings and Disposition in Court Below

This petition arises from the affirmance by the Eleventh Circuit of the confirmation, by the United States District Court, Northern District of Georgia, Atlanta Division, (the "District Court") of an arbitration award against Petitioner, William

1. Petitioner's Statement of the Case is incomplete and inaccurate. Prudential Securities Incorporated therefore restates the case and facts.

Sumner Scott ("Petitioner") in a NFA arbitration proceeding in Atlanta, Georgia. The NFA arbitration award in favor of Respondent, Prudential Securities Incorporated ("PSI"), was entered on November 20, 1995. App., D-3, D-4.[2]

Petitioner filed a "Petition to Vacate, Modify and Correct CFTC Order, Initial Decision and NFA Award" ("Petition to Vacate") on December 19, 1995 in the District Court, asserting that he had never agreed to arbitrate his dispute with PSI, that the arbitration panel was biased and evidently partial, and various other misconduct by the arbitrators in conducting the arbitration. Petitioner also asserted that PSI had procured the arbitration award by fraud, that the award was arbitrary and capricious and that his due process rights were denied in the arbitration process. App., A-3. PSI served its "Answer To Petition To Vacate, Modify And Correct Arbitration Award and Motion To Confirm The Arbitration Award" ("Motion to Confirm") on February 29, 1996. App., A-3.

On April 8, 1996, the District Court entered a Consent Order, allowing Petitioner an extension of time to file and serve his reply to the Motion to Confirm, through and including ten days following the ruling by the District Court on Petitioner's pending Motion to Admit Transcript. App., D-11. The District Court denied Petitioner's Motion to Admit the Transcript by Order dated April 12, 1996. App., D-11. On July 11, 1996, Petitioner filed a "Motion For Extension Of Time For WSS To File A Reply To The Response Filed By Prudential To The Petition And For WSS To File A Response To The Motion of Prudential To Confirm The Arbitrator's [sic] Award" ("Motion for Extension"). App., D-11.

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2. All citations to the record cite to the Appendix ("App.") to Petitioner's Petition for Writ of Certiorari.

By Order dated July 18, 1996, the District Court denied Petitioner's Motion for Extension and Petition to Vacate and granted PSI's Motion to Confirm. App., D-30. Petitioner then filed a Motion for Reconsideration pursuant to Fed. R. Civ. P. 59, 60 and 61 on July 29, 1996 ("Motion for Reconsideration"). Petitioner's Motion for Reconsideration was denied on September 4, 1996. App., C-1. Petitioner filed his Notice of Appeal on September 12, 1996. On May 18, 1998, the Eleventh Circuit affirmed the District Court's confirmation of the arbitration award. App., A-20. On July 30, 1998, the Eleventh Circuit denied a Motion for Reconsideration. App., B-1. Petitioner served his Petition in this Court on October 22, 1998.

**B. Statement of Facts**

Petitioner is a professional commodity futures speculator and a member of the Florida bar. He is registered with the Commodity Futures Trading Commission (the "CFTC") and the NFA as an associated person.[3] Petitioner formed a limited partnership, Creative Strategy Fund I (the "Fund"), the general partner of which was Creative Strategies, Inc. ("CSI"), a corporation of which Petitioner was the sole shareholder. Petitioner was the limited partner and sole investor in the Fund. The Fund opened a commodities futures account at PSI, executing all required account opening documents. App., D-2.

In March and April 1992, the Fund suffered some losses and failed to meet its margin calls. Consequently, PSI liquidated the Fund's accounts. The liquidation of the Fund's accounts resulted in a deficit of approximately $101,000. PSI brought a NFA arbitration proceeding against the Fund, and against

3. The record evidence shows that, except for the period from June 14, 1993, through January 31, 1994, Petitioner was registered as a CFTC associated person from 1987 through at least February 27, 1996. App., D-5.

Petitioner individually, to recover the deficit. The Fund objected to the NFA arbitration proceeding and elected to bring a reparations proceeding against PSI before the CFTC. The NFA arbitration proceeding against Petitioner, individually, was suspended during the pendency of the reparations proceeding. App., A-2, A-3.

In the CFTC reparations proceeding, the Fund alleged that PSI had breached its fiduciary duty to the Fund by failing to abide by loss limits set by the Fund and by offsetting credits and debits in the Fund's various accounts. App., A-2. Concluding that there was "not a scintilla of merit to his complaint," the Administrative Law Judge (the "ALJ") dismissed the Fund's claims and entered an award of $101,000 in favor of PSI on its counterclaim against the Fund. App., D-3. The Fund appealed to the full Commission. The Commission rejected the Fund's claims and affirmed the ALJ's decision in an order dated February 8, 1995. The Fund filed an appeal with the Eleventh Circuit, but the appeal was dismissed for failure to post a bond. App., D-3.[4]

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4. The underlying litigation between PSI and Petitioner has given rise to several other actions, including:

1. *PSI v. Creative Strategy Fund I and CSI*, United States District Court, Southern District of Florida, Case No. 95-8423-CIV-GRAHAM. PSI's petition to reduce the CFTC award of February 8, 1996 to judgment was granted and the petition of the Fund and CSI for a Temporary Restraining Order to set aside or postpone the NFA arbitration against Scott was denied. The Fund and CSI filed an appeal to the Eleventh Circuit at Case Number 96-4466, which affirmed the lower court's judgment. The Fund filed a petition for writ of certiorari to this Court at Case No. 97-63, which was denied.

2. *Creative Strategy Fund I v. PSI*, United States District Court, Southern District of Florida, Case No. 96-1965-CIV-GRAHAM. The (Cont'd)

## C. Renewed NFA Arbitration

After the CTFC affirmed the reparations award against the Fund, PSI renewed its NFA arbitration proceeding against Petitioner under the member to member arbitration rule. App., A-3. Petitioner objected, asserting that he had never personally agreed to arbitrate any claims between PSI and himself. App., D-5. Although aware of his objection, the NFA scheduled the arbitration for October 31, 1995. Petitioner petitioned the panel to postpone the arbitration until after the first of the year or, alternatively, to allow him to appear by telephone, claiming financial distress[5]. The panel denied both requests. On October 18, 1995, Petitioner petitioned the United States District Court for the Southern District of Florida for a Temporary Restraining Order to prevent the NFA arbitration from taking place. App.,

---

(Cont'd)

Fund filed a petition to vacate the Initial Decision of the ALJ, as affirmed by the CFTC. Alternatively, the Fund requested a writ of mandamus to compel the CFTC to issue an opinion. PSI filed its response and the CFTC intervened to oppose the Petition. PSI's and the CFTC's motions to dismiss the petition were granted on the basis of collateral estoppel. The Fund appealed the decision to the Eleventh Circuit (Case No. 97-4349), but the appeal was dismissed on procedural grounds.

3. *Scott v. PSI, et al.*, United States District Court, Southern District of Florida, Case No. 96-0453-CIV-GRAHAM. Scott brought suit against PSI, and several of its officers, including the Chairman and CEO. The action was dismissed on the ground of *res judicata* and affirmed by the Eleventh Circuit, Case No. 97-4348.

Petitioner has been unsuccessful in every forum.

5. Petitioner filed his motion to appear telephonically on October 25, 1995, a mere six days before the arbitration hearing. App., A-3.

A-3. On October 30, 1995, Petitioner's petition was denied. App., A-3. Petitioner did not appear at the arbitration but submitted a lengthy affidavit setting forth his position, as well as some documents purporting to support his position. App., A-3. Petitioner did not, however, produce a significant number of the corporate records of the Fund or CSI in response to a subpoena issued by the arbitration panel. App., D-25-27.

At the arbitration, the panel considered the evidence presented by Petitioner, the initial decision of the ALJ, the CFTC's Order dated February 8, 1995 and argument by PSI's counsel. App., D-12. The arbitration panel rendered an award against Petitioner, individually, in the amount of $106,162.54. App., D-5. Petitioner, on December 19, 1995, filed his Petition to Vacate, the denial of which, along with the granting of PSI's Motion to Confirm, formed the basis of Petitioner's appeal to the Eleventh Circuit. Petitioner now seeks review of the Eleventh Circuit's affirmance of the District Court's decision.

## REASONS FOR DENYING THE WRIT

### I.

### PETITIONER RAISES NO IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THE COURT, NOR DOES HE ESTABLISH THAT THE DECISION OF THE ELEVENTH CIRCUIT IS IN CONFLICT WITH ANOTHER UNITED STATES COURT OF APPEALS ON THE SAME IMPORTANT MATTER.

This case presents no conflict between circuit courts of appeals or with this Court's precedent. Rather, Petitioner requests this Court engage in a fact-bound application of settled

law to the circumstances of this case. Petitioner has failed to set forth, in the Petition, any "compelling reasons" for granting certiorari review, as required by Supreme Court Rule 10. The Petition seeks review of an affirmance, by the Eleventh Circuit, of the confirmation of an arbitration award against Petitioner. Petitioner has failed to demonstrate that the decision under review raises any important question of law requiring this Court's review. While the guidelines set forth in Rule 10 are not controlling on this Court, the illustrations provided in Rule 10 demonstrate that a disagreement by the losing party with the decision of the court of appeals is not a sufficient basis to seek to invoke the jurisdiction of this Court.

The Court has defined the narrow parameters of its certiorari jurisdiction. In *National Labor Relations Board v. Pittsburgh S.S. Co.*, 340 U.S. 498, 71 S. Ct. 453 (1951), the Court explained:

> Certiorari is granted only "in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals." . . .
>
> This is not the place to review a conflict of evidence nor to reverse a Court of Appeals because in its place we would find the record tilting one way rather than the other, though fair-minded judges could find it tilted either way. It is not for us to invite review by this Court of decisions turning solely on evaluation of testimony where on a conscientious consideration of the entire record a Court of Appeals under the new dispensation finds the Board's order unsubstantiated. In such situations we should

> "adhere to the usual rule of non-interference where conclusions of Circuit Courts of Appeals depend on appreciation of circumstances which admit of different interpretations."

340 U.S. at 502-503, 71 S. Ct. at 456. (citations omitted) (quotations omitted).

The Court also has more recently held that the principal purpose for which the Court invokes its certiorari jurisdiction is to resolve conflicts among circuit courts of appeals and state courts concerning the meaning of provisions of federal law. *Braxton v. United States*, 500 U.S. 344, 347-348, 111 S. Ct. 1854, 1857 (1991).

## II.

## THE PETITION SEEKS REVIEW OF ISSUES OF LAW ON WHICH THE COURTS OF APPEALS ARE IN AGREEMENT.

This Petition presents no issues on which there is a conflict between the circuit courts of appeals. In fact, the Petitioner concedes that, in holding that Petitioner was bound to arbitrate his dispute with PSI under the NFA Rules, the Eleventh Circuit was in accord with the holding of a substantially similar case in the United States Court of Appeals for the Seventh Circuit, *R.J. O'Brien & Assoc. v. Pipkin*, 64 F.3d 257 (7th Cir. 1995).[6]

---

6. The District Court held that the NFA Rules required Petitioner to submit the issue of arbitrability to the arbitration panel and, alternatively, that even if Petitioner had not agreed to arbitrate the issue of arbitrability, the District Court would independently have found that by registering as an associated person, Petitioner consented to arbitrate his dispute with PSI. The Eleventh Circuit held that the language of the NFA Rule was not broad enough to place the issue of arbitrability before the arbitration panel, but that the District Court was correct in its alternative holding of arbitrability. App., A-8.

Petitioner requests this Court not only reverse the Eleventh Circuit, but also overrule the holding in *Pipkin*.

In arguing that he should not have been required to arbitrate his dispute with PSI, Petitioner does not dispute that he was a CFTC-registered associated person. Rather, in the NFA proceedings, Petitioner asserted that there was no agreement to arbitrate his dispute with PSI because the documents he signed contained no arbitration clause, the NFA member to member rules requiring arbitration did not apply to him, and he is not personally a member of the NFA.

Pursuant to the NFA Member Arbitration Rules, associated persons of the CFTC are associate members of the NFA.[7] In fact, the record evidence shows that, except for the period of June 14, 1993 through January 31, 1994, Petitioner was registered as a CFTC associated person from 1987 through at least February 27, 1996.

The District Court found that Petitioner signed a Form 8-R application for registration as an associated person under the Commodity Exchange Act (the "CEA") and as an Associate in the NFA, which contained a provision that,

> execution and delivery of this application shall constitute . . . an express agreement by [applicant]

---

7. The NFA Member Arbitration Rules provide:

> [u]nder NFA Bylaws every person who is associated with a Member with the meaning of the term "associated person". . . and who is required to be registered as such with the Commission, must register with the NFA as an Associate.

Member Arbitration Rule 6511.1(a). App., D-5.

> that, if registered as an Associate, [he] shall become and remain bound by *all NFA requirements as then and thereafter in effect.*

App., D-29, p. 7 (emphasis added). The NFA adopted the "Member Arbitration Rules" on May 1, 1992. The Member Arbitration Rules require that, "disputes between and among Members and Associates *shall be arbitrated* under these Rules upon the filing of a claim by a Member or Associate. . . ." App., D-7 (emphasis added).

The District Court specifically held, and the Eleventh Circuit agreed, that by registering as an associated person, Petitioner consented to having this matter arbitrated. App., A-8. In affirming the District Court's determination, the Eleventh Circuit considered a decision by the Seventh Circuit under very similar facts. In *R.J. O'Brien & Assocs. v. Pipkin*, 64 F.3d 257 (7th Cir. 1995), R.J. O'Brien & Associates ("O'Brien") brought an action to confirm a NFA arbitration award against Pipkin, who was the president and principal stockholder of Sage and registered as an associated person under the CEA. *Id.* at 259. Pipkin registered as an associated person prior to the enactment of the Member Arbitration Rules. Pipkin challenged the NFA's jurisdiction to proceed with arbitration; the matter went to arbitration over his objection and ultimately resulted in an award in favor of O'Brien. In the district court, Pipkin responded to O'Brien's motion to confirm with a cross-motion to vacate, reasserting that registration as an associated person under the CEA did not constitute consent to arbitrate under the NFA Member Arbitration Rules. *Id.* at 259.

The district court confirmed the award and the Seventh Circuit affirmed. In affirming the decision, the Seventh Circuit specifically held that, by signing the Form 8-R and registering as an associated person under the CEA, Pipkin clearly consented

to arbitration under the NFA Member Arbitration Rules. *Id.* at 261.

This Petition presents nearly the identical fact situation as *Pipkin*. Scott registered as an associated person under the CEA and an associate of the NFA by executing Form 8-R and, in doing so, agreed to abide by the requirements of the NFA, in effect at the time or in the future. As such, he consented to the arbitration of any disputes between himself and other members or associates of the NFA. Far from demonstrating a conflict between the courts of appeals, Petitioner has demonstrated the consistency with which courts of appeals have treated this issue. As such, Petitioner has illustrated the lack of a proper basis for certiorari jurisdiction on the issue of his agreement to arbitrate.[8]

---

8. Petitioner also asks this Court to modify its holding in *United Steel Workers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 598 (1960) to require arbitrators to state a reason for their decision "when a party alleges to the arbitrators that fraud has been committed in their presence." Petition, p. 14. Petitioner premises this request on the unsupported assumption that the three part test for vacatur under *Bonar v. Dean Witter Reynolds, Inc.*, 835 F.2d 1378, 1383 (11th Cir. 1988) cannot be met without a written opinion by the arbitrators. *Bonar* sets forth no such requirement. Moreover, since it was decided in 1988, the *Bonar* requirements have been applied in various other jurisdictions. *Gingiss Int'l, Inc. v. Bormet*, 58 F.3d 328 (7th Cir. 1995) (applying the same requirements as set forth in *Bonar* to vacate an award under 9 U.S.C. § 10(a)); *A.G. Edwards & Sons*, 967 F.2d 1401, 1404 (9th Cir. 1992) (same); *Dean Foods Co. v. United Steelworkers*, 911 F. Supp. 1116 (N.D. Ind. 1995) (same).

The Eleventh Circuit correctly applied the law as stated in *Bonar* in holding that because Petitioner had admitted that the arbitrators had the "evidence" of fraud before them, vacatur under 9 U.S.C. § 10(a)(1) was precluded. A written opinion by the arbitrators would not have altered the fact that Petitioner presented to the arbitrators his "evidence" of fraud and they rejected it. App., A-18, n.16.

## III.

## THE PETITION IMPROPERLY REQUESTS THIS COURT EXERCISE DISCRETIONARY JURISDICTION BASED UPON ALLEGED ERRONEOUS FACTUAL FINDINGS OR THE MISAPPLICATION OF A PROPERLY STATED RULE OF LAW.

Rule 10 of this Court states that a petition for writ of certiorari is "rarely granted" when the asserted error consists of "erroneous factual findings" or "the misapplication of a properly stated rule of law." In this case, the Petitioner asserts that the arbitrators misunderstood or misinterpreted the evidence presented at the arbitration and disagrees with the decision of the arbitration panel to hold him personally liable for the debts of the corporation of which he was the sole shareholder.[9]

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9. The Eleventh Circuit also rejected Petitioner's argument, reasserted in this Court, that Petitioner's membership in the NFA did not have a sufficient nexus with his dealings with PSI to support a finding of an agreement to arbitrate. In rejecting this argument, the Eleventh Circuit noted that the NFA arbitration rules did not limit the arbitration requirement to disputes between the parties which involve the NFA. The Eleventh Circuit also rejected as irrelevant Petitioner's repeated assertions that he structured the Fund's accounts with the specific intent to avoid personal liability. The Eleventh Circuit noted:

> Scott's arguments about the structure of the accounts and his personal liability have *nothing* to do with the issue at hand: whether Scott's personal status as an associate member of the NFA required him to arbitrate the merits of an alleged dispute with PSI.

App., A-17, n.12. (Emphasis in the original). Petitioner has made no showing that this holding raises any issue which invokes the certiorari jurisdiction of this Court. He merely disagrees with the Eleventh Circuit on its interpretation of the law.

Petitioner filed a Petition to Vacate the arbitration award in the District Court, which reviewed the record and affirmed in a thirty page opinion, with extensive findings of fact. Petitioner then filed an appeal in the Eleventh Circuit, asserting the same errors in findings of fact and misapplications of law. The Eleventh Circuit reviewed the record in the District Court and the District Court's opinion and affirmed the award against Petitioner. Now, Petitioner again seeks review of the same alleged erroneous factual findings and misapplications of law in this Court.

Under the language of Rule 10 and this Court's articulations of the scope of its certiorari jurisdiction, Petitioner's reliance on disputed factual matters fails to establish a basis for certiorari review. Petitioner has raised essentially this same dispute in multiple court proceedings regarding the conduct of this arbitration. Petitioner has lost on every level, both under the facts and the law. Petitioner has had his day in court on these matters and his attempt, in this Court, to seek an opportunity to relitigate factual determinations with which he is dissatisfied should not be countenanced.[10]

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10. Petitioner asserts that the filing fee required by the NFA to bring a counter-claim or third-party claim in the arbitration action constituted a denial of his access to courts under the Florida and United States Constitutions. Petitioner asserts that the NFA denied his access to courts prior to the taking of his property. Petitioner raised no claim under the United States Constitution in the lower court.

The Eleventh Circuit summarily rejected this argument. App., A-20, n.22. Even assuming that the NFA is a government body, Petitioner has provided no support for his position that an arbitration, which took place in Georgia under the rules of the NFA and in which Petitioner participated, is subject to the Florida constitutional provision guaranteeing access to courts. The Florida Constitution, article I, section 21 provides that, "[t]he courts shall be open to every person for redress

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## CONCLUSION

Based on the foregoing arguments of law, Respondent, Prudential Securities Incorporated, respectfully requests this Court deny the Petition for Writ of Certiorari for failing to demonstrate any basis for this Court to exercise its jurisdictional discretion.

Respectfully submitted,

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of any injury . . ." FLA CONST., art. I, § 21. Petitioner presents no support for his contention that Florida constitutional provisions apply to private arbitration proceedings in a different state.

Furthermore, Petitioner ignores the fact that he voluntarily contracted with the NFA and agreed to abide by all the requirements of the NFA, including the arbitration requirement and the filing fee requirement. *Caporale v. NASD*, No. CIV.A.90-4070, 1991 WL 281890 at *1 (D.N.J. May 10, 1991), *aff'd*, 986 F.2d 12 (3rd Cir. 1992) (by entering into arbitration agreement to be governed by the NASD rules, plaintiff contractually agreed to abide by NASD fee rules; plaintiff's claim that the fee requirement is unconscionably high does not state a constitutional claim, but rather a contractual one which must be resolved under the procedure prescribed by the NASD). Once again, Petitioner makes no showing of a basis for the invocation of this Court's jurisdiction other than his assertion that the court of appeals erred in applying the law.